

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE MARIANA R. PFAELZER, U.S. DISTRICT JUDGE
PRESIDING

NEUROGRAFIX,)	
)	
Plaintiff,)	
)	
vs.)	No. CV 10-1990-MRP
)	
)	
SIEMENS MEDICAL SOLUTIONS USA,)	
INC.,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

WEDNESDAY, OCTOBER 5, 2011

MOTIONS

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1 **LOS ANGELES, CALIFORNIA; WEDNESDAY, OCTOBER 5, 2011; 11:10 A.M.**

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4 THE CLERK: In the matter of calendar item 1, case
5 No. CV 10-1990, NeuroGrafix versus Siemens Medical Solutions
6 USA, Inc.

7 Counsel, please state your appearances for the
8 record.

9 MR. FENSTER: Good morning, Your Honor. Marc Fenster
10 with Russ, August and Kabat. With me today is Andrew Weiss and
11 Fredricka Ung -- U-n-g -- and we're here on behalf of the
12 plaintiffs.

13 MR. LoCASCIO: Good morning, Your Honor. On behalf
14 of the defendants, Siemens Medical Solutions and Siemans A.G.,
15 Gregg LoCascio from Kirkland and Ellis, LLP, along with my
16 partner, Sean McEldowney.

17 THE COURT: Now, let's do it in the order it's here.
18 Let's start with this motion for -- let's not do it that way.
19 Just a minute.

20 Let's start with the reconsideration motion, which is
21 No. 3 on the calendar.

22 MR. FENSTER: Your Honor, may I approach? I have
23 binders with slides we'll be using today for the court and for
24 the clerks.

25 THE COURT: Thank you.

1 THE CLERK: Thank you.

2 THE COURT: Have you seen these?

3 MR. LoCASCIO: Yes, Your Honor. We exchanged them
4 when we got in this morning.

5 THE COURT: All right. That's fine.

6 MR. FENSTER: Your Honor, we respectfully ask the
7 court to reconsider its ruling that claims 36, 39, 46 and 49
8 are step-plus-function claims. The Federal Circuit has never
9 applied step-plus-function claims to a method or process
10 claims, ever. Every time that it has come up before the court,
11 where the lower court applied step-plus-function claims, the
12 Federal Circuit reversed. The only situation in which the
13 Federal Circuit even allowed a step-plus-function construction
14 to be applied was in the majority opinion in *Seal-Flex*, and
15 that is the opinion in which Judge Rader penned his concurring
16 opinion explaining why the court should have reversed the
17 court's claim construction and held that it was not
18 step-plus-function; and that is the *Seal-Flex* concurring
19 opinion that this court cited in its claim construction order.

20 Slide three, please.

21 The application of a step-plus-function doctrine in
22 this case is just contrary to Federal Circuit law. What *Masco*
23 says is that, "... we are unwilling to resort to that
24 provision" -- meaning Section 112, paragraph six -- "to
25 constrain the scope of a claim limitation without a showing

1 that the limitation contains nothing that can be construed as
2 an act."

3 Each of these claims are not written in
4 means-plus-function form.

5 Next slide.

6 First, they're not written in means-plus-function
7 format, so they are presumptively not means-plus-function.
8 Moreover, it can't be construed unless there is a showing that
9 the limitation contains nothing that can be construed as an
10 act.

11 Now, the court goes further -- the Federal Circuit
12 says that "Where a preamble" -- this is next slide, please --
13 "Where a preamble sets off the steps of a claimed method with
14 the phrase, 'comprising the steps of,' as opposed to 'the steps
15 for,' that is further indication that the patentee did not
16 intend to invoke Section 112, paragraph six." And that is how
17 paragraph 36 is set out. It is a method including the "steps
18 of," and then it goes through and lists the steps, the acts,
19 which are exposing, exposing, sensing, vector processing and
20 processing. Each of the claims that this court held were
21 step-plus-function contain acts.

22 Next slide.

23 THE COURT: Because they have an "i-n-g" on the end
24 of the verb?

25 MR. FENSTER: No, Your Honor, not only that. Each of

1 the acts -- a-c-t-s, acts -- that are recited in claims 36, 39,
2 46, and 49 are transitive verbs. "Processing" is "to operate
3 on." It is a verb with an object. It's a transitive active
4 verb. That is true with "analyzing" and "combining." These
5 are active verbs with objects. They are acts acting upon an
6 object.

7 The Federal Circuit in -- Judge Rader, in his
8 concurring opinion in *Seal-Flex*, cited by this court, explained
9 the difference and explained when an "i-n-g" verb -- or an
10 "i-n-g" word should be an act and not a function.

11 THE COURT: Yes, I know that.

12 MR. FENSTER: And what the court said is that a
13 function corresponds to what the element accomplishes, whereas
14 "acts" correspond to how the function is accomplished.

15 THE COURT: Let me shortcut this a little bit. I
16 realize that whoever drafted the claim was perhaps not
17 intending this to be step-plus-function, and you're asking the
18 court to look at what the person intended who drafted the
19 claim.

20 MR. FENSTER: In part, but I'm asking the court to
21 apply the Federal Circuit law. The Federal Circuit law says
22 this claim is presumed not to be step-plus-function --

23 THE COURT: I understand about the presumption; I'm
24 not quarreling with that.

25 MR. FENSTER: Yes. I think that the courts do look

1 to whether the patentee intended to invoke Section 112,
2 paragraph six, they do look to the language to see whether that
3 intent was evoked, they look to the file history to see whether
4 or not the patentee intended to invoke 112, six. All evidence
5 in this case undisputably indicates that the patentee did not
6 intend to invoke 112, paragraph six. I agree with Your Honor
7 that's not the end of the inquiry.

8 THE COURT: No, it isn't.

9 MR. FENSTER: So what we have to do is follow the
10 analysis set forth by Judge Rader in *Seal-Flex*, and in
11 *Seal-Flex*, that patent dealt with -- go back to seven -- you're
12 on seven -- so that patent claimed "Spreading an adhesive tack
13 coating for adhering the mat..."

14 THE COURT: Let me cut through this point, too.

15 MR. FENSTER: Okay.

16 THE COURT: Is this claim that we're looking at a
17 claim for software?

18 MR. FENSTER: No.

19 THE COURT: What is it?

20 MR. FENSTER: It's a process claim. It's a method
21 claim. This is claim 36, Your Honor. It's a method for
22 utilizing an MRI machine.

23 THE COURT: And a computer.

24 MR. FENSTER: And a computer to determine the shape
25 and position of a structure.

1 THE COURT: Moreover, it's a standard computer, isn't
2 it?

3 MR. FENSTER: No, I don't believe it is, Your Honor.

4 THE COURT: Well, now, who programmed the computer to
5 do what you want it to do?

6 MR. FENSTER: A computer is not claimed in this
7 method claim. I think that there are process -- there are
8 apparatus claims in claims 54 and 55, in those claims, which do
9 claim the apparatus.

10 THE COURT: Wait. How do you process the
11 information, the data set at this -- on this limitation? How
12 do you process it? With a computer, don't you?

13 MR. FENSTER: Yes --

14 THE COURT: Wait. It's not just any computer, is it?
15 It's one that is programmed.

16 MR. FENSTER: The method claim does not specify, nor
17 require, nor could it, the apparatus used to perform the steps.

18 THE COURT: So you use whatever is at hand, do you
19 not?

20 MR. FENSTER: This claim would be met if that
21 processing step is done with anything.

22 THE COURT: That's right, with anything. But it has
23 to be a programmed computer. It's a software step.

24 MR. FENSTER: I disagree with the court's
25 characterization, Your Honor. This is not -- this is -- it is

1 a process claim, it is a method claim. It is not limited to
2 any particular apparatus. It is improper and, in fact, would
3 render the claims indefinite under IPXL if we had mixed
4 apparatus and method claims. This is not an apparatus claim,
5 and I think that it is improper for the court to be looking --
6 to be thinking about this as an apparatus claim and what's --

7 THE COURT: All right, then. This is your broadest
8 set of claims. You just process however you process on
9 whatever is at hand.

10 MR. FENSTER: I disagree with that characterization
11 as well, Your Honor.

12 THE COURT: You tell me how to read it. You tell
13 me -- all right. Let's get right to it. You tell me,
14 Mr. Fenster, that this step, this limitation, do you see it,
15 (e), is it?

16 MR. FENSTER: Yes.

17 THE COURT: You process the data representative of
18 what you want to generate a data set describing the shape and
19 position. Now -- et cetera.

20 You do that on a computer which has been programmed
21 to permit one skilled in the art to do it, right?

22 MR. FENSTER: I think that the answer is right, but
23 the question is irrelevant to the analysis of
24 step-plus-function.

25 THE COURT: Go ahead.

1 MR. FENSTER: For step-plus-function, you only look
2 to see whether an act is recited, and Judge Rader counseled
3 us --

4 THE COURT: All right. Let me just grant you this.
5 I'm not purporting to have a real dispute with you, I'm trying
6 to get out what you're saying. Let's assume it's not a
7 step-plus-function claim, just as you say. Now you tell me the
8 processing is done some way by somebody, and but they have to
9 begin with a computer, don't they?

10 MR. FENSTER: I don't believe so. So that is a fair
11 question, Your Honor.

12 THE COURT: You wouldn't have to begin with a
13 computer? You said that in the patent.

14 MR. FENSTER: I think as a practical matter that is
15 how it's done, but as a matter of claim construction, no.

16 THE COURT: Oh, well, but the processor is a computer
17 under the patent.

18 MR. FENSTER: But the claim -- this claim, claim 36,
19 does not claim a processor, it claims a method, and I believe
20 that it is -- that the court is confusing the analysis of the
21 means-plus-function apparatus claims with this method claim in
22 claim 36; and claim 36 requires the step of processing the data
23 to perform a function, which is to generate a data set, and the
24 act is processing.

25 Now, it is a fair question to say, Well, what does

1 processing mean?

2 THE COURT: That's right.

3 MR. FENSTER: Okay. So that is a fair question, and,
4 in fact, that's what the Federal Circuit did in -- I'll find
5 the case in just a second. But when they found that it's not
6 step-plus-function, they remanded to the court to say, Okay,
7 determine what "processing" means or "determining" means.

8 THE COURT: That's precisely what I'm asking you.

9 MR. FENSTER: That is an absolutely fair question,
10 and it's one that has not been presented to the court. And
11 honestly --

12 THE COURT: Oh, yes it has. Whether you have
13 presented it or the court's presented it to itself, it has been
14 presented.

15 MR. FENSTER: Okay. Well, my apologies to the court.
16 I don't believe that we have briefed the meaning of
17 "processing" on its own.

18 THE COURT: Okay. Then I will present it to you.

19 MR. FENSTER: I'm not prepared to answer what
20 "processing" means. "Processing" means to operate on the data
21 in order to generate a data set. I am not prepared to offer a
22 claim construction of processing right now because that's not
23 where -- I apologize that I'm not.

24 THE COURT: Well, wait. Let's just look at the --
25 we're now on a controversy that I cannot resolve with you this

1 way. I'm saying to you, first of all, assume for a minute that
2 it's not step-plus-function. I understand what your objection
3 to that is. You'd be limited to whatever is in the spec, and
4 you'd have to have a link with that, and there isn't anything
5 in the spec except references. Wait. Let me -- I can clear up
6 what is wrong with my thinking if I just point out to you that
7 on column 11 -- we have to have this out now because if we
8 don't, we're going to -- column 11 says, A computer, 72, and
9 the front-end circuit, 74, form the processing system, 16, the
10 input and the -- and so on and so on -- as shown in six.
11 Computer, 72, and circuit, 74, cooperatively control and
12 synchronize the operation of the MRI system, 14, as well as
13 processing a display. The acquired data, the computer, 72, is
14 an IBM-compatible personal computer. Then it tells you about
15 it.

16 Somebody's got to program the computer.

17 MR. FENSTER: I agree with you that for the
18 means-plus-function apparatus claims, we do have to analyze
19 what is doing the processing because those were
20 means-plus-function claims.

21 THE COURT: Don't you have to do it now? If it's a
22 software patent, irrespective of whether it's
23 step-plus-function, wouldn't you have to have -- point out some
24 way of programming or --

25 MR. FENSTER: No.

1 THE COURT: No?

2 MR. FENSTER: Absolutely not. Your Honor --

3 THE COURT: So your skilled -- your person skilled in
4 the art uses whatever is there.

5 MR. FENSTER: If they process in order to generate a
6 data set to determine the shape and position, which is the
7 function recited, then they perform the steps set forth in the
8 method. Now, it is a fair question to say, Do we need any
9 further construction of processing the data or not?

10 THE COURT: That's right.

11 MR. FENSTER: We submit that it has a common,
12 ordinary meaning, and the only challenge -- the only question
13 raised before the court --

14 THE COURT: What is its common, ordinary meaning?
15 It's in here.

16 MR. FENSTER: I think the common, ordinary meaning of
17 processing the data is operating on the data in a way to
18 generate the data set, but it's not -- the common, ordinary
19 meaning is not the apparatus used or the software or the
20 algorithm or the computer used to do it.

21 THE COURT: Could you do it without a computer?

22 MR. FENSTER: No. But, again, Your Honor, that is
23 irrelevant to the question of whether this is
24 step-plus-function, and if it's not step-plus-function, then
25 we're in normal claim construction --

1 THE COURT: I am abandoning step-plus-function. I'm
2 now saying to you let's assume for a minute that it's not.

3 What flows from that conclusion?

4 MR. FENSTER: Okay. What flows from that conclusion
5 is the court needs to determine if any claim construction is
6 necessary as a normal act, as a normal word, "processing,"
7 whether that word is so unclear that the court needs to give
8 guidance to the jury to tell them what "processing" means.
9 This is not a question that was raised before the court. The
10 only issue raised before the court on -- at the claim
11 construction phase initially was what was Siemens' position
12 that this is step-plus-function. That's it. We disagreed, but
13 there was no alternative if it's not step-plus-function, what
14 is the proper claim construction.

15 THE COURT: You're asking the alternative now. I'm
16 asking.

17 MR. FENSTER: And our position is it doesn't need
18 claim construction, that it is just to operate on the data
19 that -- processing the data is something that the jury will
20 understand.

21 THE COURT: How would they understand it?

22 MR. FENSTER: It's not --

23 THE COURT: Can't do it by hand.

24 MR. FENSTER: I think -- I think it would be improper
25 for the court -- if we go through a claim construction process

1 where we say, Okay, what is proper claim construction, and
2 defendant and plaintiff exchange proposed claim constructions
3 and brief it to court, we'll come up with a proper claim
4 construction. That claim construction would not be limited to
5 a particular algorithm or a particular apparatus for doing it.

6 THE COURT: No? Why?

7 MR. FENSTER: Because it would be improper to import
8 an apparatus limitation into a method claim. Method steps are
9 generally --

10 THE COURT: So how does your expert explain to them
11 what's to be done here? Your expert says you process on this
12 computer that we have attached to the MRI machine.

13 MR. FENSTER: Yes, but that doesn't mean -- just
14 because the infringement analysis shows that a computer is used
15 to perform that step does not mean that the proper claim
16 construction would limit it to a particular apparatus or not.

17 THE COURT: I want to put it very directly to you:
18 Just any way you process would be infringing. I mean, you'd
19 meet the infringement requirement for this limitation.

20 Isn't that true?

21 MR. FENSTER: Your Honor, claim 36 is a very specific
22 claim. What it requires is that you use, in step (a) --

23 THE COURT: Oh, I know what you do in step (a).

24 MR. FENSTER: Well, Your Honor, this is important
25 because this is -- you're asking me an open-ended question to

1 suggest that this is a very broad claim, and it is not.

2 THE COURT: Any way you process under your theory,
3 any way an expert will get on the stand and say, Well, there's
4 always a computer attached to the MRI machine, and any way you
5 process using that computer you're infringing.

6 MR. FENSTER: If you perform the step of processing
7 data representative of anisotropic diffusion to generate a data
8 set that describes the shape and position, then, yes, I believe
9 that that act --

10 THE COURT: Any way you do it.

11 Now, let's assume for a minute that the years go by
12 and various companies come up with better ways to do that. It
13 doesn't matter whether they have a better way or not, any way
14 you do it will infringe.

15 MR. FENSTER: Your Honor, I'm troubled by the
16 court -- by what I perceive as the court's disposition to
17 invalidate the patent.

18 THE COURT: You are totally wrong. You are
19 completely wrong, Mr. Fenster.

20 MR. FENSTER: I hope so.

21 THE COURT: I do really have to stop you right there.

22 MR. FENSTER: Okay.

23 THE COURT: You don't need to think that I have spent
24 all these hours on this patent with the idea of invalidating
25 it. I would not venture that if I were you.

1 MR. FENSTER: Okay. I apologize to the court.

2 THE COURT: You have absolutely no idea of the amount
3 of time that's been spent on this, none. You have no idea.
4 And, consequently, you must not jump to the conclusion that you
5 jumped to. I don't want to do you a disservice; I do want to
6 understand what you're talking about.

7 MR. FENSTER: Okay. So, Your Honor, the --

8 THE COURT: That's my job.

9 MR. FENSTER: I appreciate that, Your Honor.

10 The processing step -- so in a claim -- in a claimed
11 method, you look to determine whether a method is comprised of
12 certain steps that accomplish certain functions that are
13 recited. If those acts are performed, then the claim is met --
14 and, yes, it may be that after-developed technology further
15 improves the processing, that's not -- if anything, that's an
16 enablement question, it's not a claim construction and it's not
17 an infringement question. But the case law, as I understand
18 it, has developed such that when a claim specifies the acts in
19 a method claim or the elements of an apparatus claim, it is
20 broad enough to encompass certain after-developed technology.

21 And so, yes, I do agree that if someone performs the
22 steps as recited in claim 36, however they do it, with whatever
23 apparatus they do it, claim 36 will be infringed. That is my
24 understanding of claim 36, and I believe that it's fully
25 supported from a 112 perspective in terms of enablement by the

1 specification. The specification fully enables how to perform
2 each of the steps of claim 36 and that's what the law requires.
3 And then if -- see what comes up with a new and better MRI
4 machine or a new and better algorithm for processing but still
5 performs the steps of these methods, it's covered.

6 THE COURT: You and I perfectly agree on your
7 position, perfectly.

8 MR. FENSTER: Okay.

9 THE COURT: But there's no reason why we can't
10 discuss it, is there?

11 MR. FENSTER: Not at all, and I love the discussion,
12 I really do.

13 THE COURT: Well, let me tell you: It was hard to
14 get to this point. That's what you're saying, isn't it?

15 MR. FENSTER: Yes, Your Honor.

16 THE COURT: Let me hear from the other side.

17 MR. FENSTER: Sure.

18 MR. LoCASCIO: Good morning, Your Honor.

19 THE COURT: I'm not on your side.

20 MR. LoCASCIO: I don't come in anticipating that the
21 court, in any court, much less this one, leans one way or the
22 other. My view is Your Honor's job, and you've done to date,
23 call them balls and strikes, to interpret the law. That is
24 what the court, as I understand it, is here to do. That's
25 claim construction in a nutshell, and I don't think either

1 side, frankly, disagrees with that, Your Honor.

2 THE COURT: All right.

3 MR. LoCASCIO: Let me start off with -- two questions
4 Your Honor asked. I just want to give an answer to those as
5 you asked them. I was looking through the patent and thinking
6 about some of those issues, and now I want to walk through some
7 points we prepared on this, Your Honor.

8 First off, I think Your Honor identified exactly
9 where in the patent the processing is described, and that was
10 column 11. I believe Your Honor was reading from line nine
11 through about 16 or 17.

12 THE COURT: Right.

13 MR. LoCASCIO: The distinction between the apparatus
14 and the method claims are the apparatus, as Your Honor
15 determined, covers this black box to process. It's
16 means-plus-function --

17 THE COURT: Right.

18 MR. LoCASCIO: The method claims cover using that
19 black box to process. That's the difference between those
20 claims. And either the step-plus-function claims are
21 step-plus-function without any identified structure, which is
22 what Your Honor found, i.e., indefinite; they are
23 step-plus-function with structure, which you'd have to go back
24 to the specification to find it. There is none. Or, on
25 Mr. Fenster's analysis, that we just go ordinary meaning and

1 ignore 112, paragraph six. At that point, what would happen to
2 this claim is it would be not enabled.

3 There's no route through this. Mr. Fenster would
4 like to have it not be a claim construction issue, but nowhere
5 in this patent does it tell you how you would do that
6 processing. I want to talk about how it is step-plus-function
7 under 112, six, and Your Honor's construction of that is
8 correct and consistent with Federal Circuit law.

9 But even if the hypothetical Your Honor played out
10 with Mr. Fenster of it's not step-plus-function, Well, where do
11 we go from there from a claim construction standpoint?
12 NeuroGrafix' view would be you need do nothing. I disagree.
13 But the ultimate outcome of doing nothing would then create the
14 very same problem that's recognized when you actually look at
15 what does it describe to perform this. There's no enablement
16 at all of this, and, indeed, it's not an issue for today,
17 although it's now, sort of, become one a little bit.

18 The inventor -- one of the inventors, Dr. Tsuruda,
19 testified that at the time they filed this, they had no
20 software algorithm to do it, they'd never done it. It was a,
21 Hey, wouldn't it be great if we could do this?

22 And the way they've claimed it, it's
23 step-plus-function. At the end of the day, if it wasn't, it
24 wouldn't be enabled. But let me, sort of, back up now to the
25 step-plus-function analysis and start off where Mr. Fenster

1 did.

2 What's the state of the law? Well, the Federal
3 Circuit law we can look at, we can talk about. I want to talk
4 about the four primary cases at issue --

5 THE REPORTER: Excuse me. Counsel, please slow down.

6 MR. LoCASCIO: Sure. Pardon me. Thank you for
7 letting me know.

8 Thirty-five U.S.C. 112 is the law, and it says you
9 can have means-plus-function and step-plus-function. And
10 NeuroGrafix' position seems to be there's no such thing as
11 step-plus-function. There are points in the reply brief where
12 they say if it could even be found -- if claims could ever be
13 found to be step-plus-function, well, that's certainly not the
14 law. Paragraph six of Section 112 of 35 U.S.C. makes clear
15 they exist. And let's look at what the Federal Circuit has
16 actually said.

17 The key is what does the claim say? It all comes
18 back to not what the inventors intend, absent disclosure of
19 that --

20 THE COURT: Well, it is a, kind of, general rule
21 about how to write it. There are some general rules about how
22 to write these things.

23 MR. LoCASCIO: If we look at the section we're
24 talking about --

25 THE COURT: (E).

1 MR. LoCASCIO: (E), exactly. Claim 36(e), processing
2 the data to generate. And the difference between this and the
3 claim language in the earlier Federal Circuit cases is -- let's
4 talk about *Seal-Flex* last -- okay -- the other three, *Cardiac*
5 *Pacemakers*, *Masco* and *O.I. Corp.* The claim language in those
6 is not a "step for" or a "step to" or something akin to a verb
7 "processing to" or "processing for."

8 The language -- I have just my notes on these. We
9 can pull the actual case up. But *Cardiac Pacemakers*, for
10 instance, is determining a condition -- zoom out here --
11 determining a condition of the heart from among. That is a
12 traditional piece in a method claim, it's a step, but it
13 doesn't have function. It's not a "step for" doing anything.
14 It's just determining a condition. It's not surprising that
15 the Federal Circuit said that's not 112, six.

16 *Masco* is transmitting a force applied to a dial or
17 applied to a knob. Again, it's not a "step for" or "step to"
18 do anything. *O.I. Corp.*, passing the analyte slug through a
19 passage, et cetera. Again, there's not a verb "to do"
20 something in any of those. So the fact that the Federal
21 Circuit in each of those cases said it's not 112, six shouldn't
22 surprise anyone?

23 In *Seal-Flex*, by contrast, it is spreading adhesive
24 tack for adhering. So what you have is a verb, "spreading," to
25 accomplish something: Spreading for adhering. And that is

1 akin to the situation we have here because the language here is
2 "processing the data set to generate." And in *Seal-Flex*, the
3 court said the parties agreed it was 112, six, even though it
4 wasn't presumptively so, and that was left standing on appeal.

5 In this case, we have similar language. We have
6 "processing the data to generate a data set." So it comes down
7 to is it presumptively means-plus-function? They don't use the
8 magic words "step for," although I want to -- actually, I left
9 the clicker over there.

10 Sean, can you just type slide seven?

11 Your Honor, may I approach with some slides?

12 THE COURT: Do.

13 MR. LoCASCIO: Thank you.

14 And what we see here in slide seven, Your Honor --
15 I've got it on the screen, as well, is -- pardon me. What we
16 handed Your Honor has several sections. We put them in the
17 order we had wrongly anticipated we might proceed through here.
18 So there is a tab called "Step-plus-function," which is the
19 last tab, and slide seven in that deck is what I've got on the
20 screen right now, which talks about how processing doesn't
21 describe or cite an act. And Mr. Fenster put up some
22 definitions of processing and analyzing. Those were not in the
23 briefing on *Markman*; what I've got on the screen was.

24 On the right side in slide seven is a dictionary
25 definition of "processing," and it's previously before Your

1 Honor. "Processing" means put through the steps of a
2 prescribed procedure. And if you look then below, the *O.I.*
3 *Corp.* quote on page seven, steps -- "We interpret the steps to
4 refer to the generic descriptions of elements of a process."

5 So by using "processing," Your Honor, in some ways
6 we've just synonymized "steps" and "processing." The
7 definition of "process" is to put something through certain
8 steps. The court -- the Federal Circuit has determined "steps"
9 to be a generic description of the elements of a process,
10 whereas "acts" refers to how to actually do it.

11 So the idea that "processing" tells one how to do it
12 is inconsistent with the ordinary meaning and definition of
13 "processing," which means put it through steps.

14 At the end of the day, this claim, Your Honor, is
15 not -- I'm not arguing it's presumptively step-plus-function --

16 THE COURT: You can't.

17 MR. LoCASCIO: I'm not. We agree that I can't
18 because -- and I'm not.

19 But the language that they actually used here is
20 virtually synonymous with saying "steps to generate" because
21 given they've said "processing to generate." And whether that
22 was artful to try to avoid the presumption or not, doesn't
23 matter. The specification in the file history here never
24 describe -- never give any indication that we should deviate
25 from how this claim is written. And how the claim is written,

1 you have to come back to, Your Honor, how the function is
2 accomplished. If I back up a slide, to slide five, the act
3 here --

4 THE COURT: Well, Mr. Fenster says that it doesn't
5 matter how you do it.

6 MR. LoCASCIO: The Federal Circuit in *Seal-Flex* and
7 *O.I. Corp.* say you have to describe in your claim how to do it,
8 and if you do not, while the presumption may exist in one
9 direction, it would be overcome and rebutted, as Your Honor
10 found, in the *Markman* decision if they don't describe it.

11 THE COURT: Well, let's just assume, because
12 Mr. Fenster does not want a step-plus-function analysis of this
13 claim because it would limit him to what is in the spec, and
14 there isn't anything in the spec. And, consequently, we have
15 to take another tack here for the purpose of discussion.

16 Let's assume for a minute that the motion to
17 reconsider is granted and it's not construed as a
18 step-plus-function claim. What then?

19 MR. LoCASCIO: If it's not construed as a
20 step-plus-function at all, and, obviously, I expect Your Honor
21 already recognizes that we disagree with that presumption.

22 THE COURT: Of course.

23 MR. LoCASCIO: I know. Just wanted to make clear
24 that any reader of this later in life says, Okay, Mr. LoCascio
25 didn't say we were onboard with this.

1 If that was the case, I think you'd have an issue
2 where, if it was ordinary meaning -- which is Mr. Fenster's
3 only proposed construction for this -- then you'd have a
4 situation where the claim is not enabled.

5 THE COURT: Is what?

6 MR. LoCASCIO: Not enabled. That's where I think
7 that would go.

8 THE COURT: Is it described?

9 MR. LoCASCIO: I don't believe how to accomplish
10 it -- which would be what you would need to describe here -- is
11 anywhere in this specification, Your Honor. All it says is you
12 could use a computer to process, but it doesn't tell you what
13 that computer would have or frankly how you would do this.

14 THE COURT: Let's go to the next step.

15 MR. LoCASCIO: Okay.

16 THE COURT: Let's assume that, whatever meaning you
17 give it and that an expert gets to testify about how this would
18 be done, there is no limitation on infringement with respect to
19 this limitation, is there?

20 MR. LoCASCIO: I agree. There would be none. At
21 this point, it's using an MRI machine and processing it in some
22 way to generate this data.

23 THE COURT: No, it's using an MRI machine and a
24 computer.

25 MR. LoCASCIO: Correct, Your Honor, and the computer

1 of some sort does some sort of processing that is undefined,
2 and if that happens, ergo, you infringe.

3 THE COURT: Well, now, what's the -- let me also
4 pursue one other avenue. If it's pointless to you, still
5 answer it.

6 MR. LoCASCIO: I would have anyway, but thank you for
7 reminding me.

8 THE COURT: All right. Where is the point of novelty
9 here?

10 MR. LoCASCIO: Your Honor raises a question that we
11 identified as well. And if I can go --

12 Sean, type 28. Flip there.

13 THE COURT: Where am I?

14 MR. LoCASCIO: Slide 28, Your Honor. Slide 28 looks
15 to what does this limitation matter? Is this the point of
16 novelty or not?

17 THE COURT: Just one second.

18 MR. LoCASCIO: Sure.

19 THE COURT: Oh, I see. All right.

20 MR. LoCASCIO: What Slide 28 talks about in the
21 context of *Cardiac Pacemakers* -- because in *Cardiac Pacemakers*,
22 the limitation at issue, which was not a verb "to do" something
23 or a verb "for doing" something, talked about how that step was
24 frankly not the point of novelty.

25 Here, NeuroGrafix is -- the processing piece of this

1 claim is, in fact -- was described as the point of novelty.
2 These are plaintiff's, NeuroGrafix's, opening and reply *Markman*
3 briefs. The first quote -- this is the bottom of the page --
4 the inventors figured out how to create three-dimensional data
5 sets representative of neural tissue. Okay. Putting aside
6 that the only testimony to date is that they hadn't. Where is
7 that in the patent? It's nowhere. It's not described, it's
8 not disclosed. They don't tell you how to do it.

9 And so with respect to these claims, Your Honor, the
10 use of this term, "processing," in these claims to generate a
11 particular data set, that is the point of novelty. And as
12 *Honeywell* and other cases say, where we're talking about the
13 alleged point of novelty, we can't just gloss over the
14 indefiniteness issues because that's the core of the matter.
15 If you don't look to see if they actually describe it and
16 describe in this case the way of performing, the "how" to
17 perform that function, well, then, the claim is, as you
18 identified, very broad -- charitably, what is called very
19 broad.

20 And the point of novelty in which they obtain a
21 patent was that improvement, which is never described or
22 discussed anywhere and now would be, in essence, read out of
23 the claim because the claim would be so broad as to encompass
24 any way to do it, regardless of the alleged novel improvement
25 over the prior art. So, hopefully, that answers Your Honor's

1 question on that score.

2 THE COURT: Well, let's let Mr. Fenster speak now.

3 MR. FENSTER: Your Honor, first, let me just correct
4 what Mr. LoCascio said regarding the four primary Federal
5 Circuit cases. First, with respect to *Masco*, he said that it
6 was different than this case because it was transmitting a
7 force but didn't say to do something. The language of -- and
8 he didn't have the case in front of him. I put the case on the
9 Elmo for the court. Here is the language that *Masco* -- that
10 the *Masco* Federal Circuit court looked at, that it was
11 transmitting a force applied to the dial to drive the lever.
12 Just like this case is processing to generate a data set, just
13 like in *Seal-Flex*, it was adhering -- or spreading the adhesive
14 to adhere. And in that case, *Masco* reversed the lower court --
15 lower court's finding that it was step-plus-function.

16 In *Seal-Flex*, while the majority opinion left alone
17 and just did not address the parties' agreement that
18 step-plus-function applied, it is Judge Rader's thoughtful
19 concurrence, that this court cited in its claim construction,
20 which did go through and say notwithstanding the parties'
21 agreement, I think it incumbent upon the court to analyze the
22 112, six issue --

23 THE COURT: So do I.

24 MR. FENSTER: -- and doing so, Judge Rader found it
25 was improper to apply step-plus-function notwithstanding the

1 parties' agreement.

2 THE COURT: I think he's right about what he says
3 here, that you must analyze it, and that is why I asked you all
4 the questions I asked you.

5 MR. FENSTER: So, now, with respect to -- you asked
6 what is the point of novelty and would this cover any method?
7 And, Your Honor, I have to object to Mr. LoCascio's
8 characterization, and the court's, to this extent: That it
9 would cover any method. Claim 36 is a very specific method,
10 and the point of novelty, Your Honor -- and if you'll allow me
11 to just walk through the claim -- this is a specific claim.
12 This requires exposing to a predetermined arrangement of
13 diffusion-weighted gradients and vector processing in order to
14 generate a data set that shows the nerve, as distinguished from
15 surrounding structures that do not show diffusion anisotropy.

16 THE COURT: Yes, I know.

17 MR. FENSTER: That is the point of novelty of this
18 claim. The point of novelty of claim 36 is this combination of
19 using a predetermined arrangement of diffusion-weighted
20 gradients and vector processing in order to generate the data
21 set in order to show the nerve in a way that was previously
22 unknown.

23 This is an important invention, Your Honor. It is
24 used daily to materially help people. A very dear friend's
25 daughter yesterday got a neurogram of her face to show how to

1 correct some surgery -- how to surgically correct some damage
2 that was done to her nerves during brain cancer surgery. This
3 is important: Up until 1992, it was unknown how to image
4 nerves outside of the brain and cerebral spinal fluid.

5 University of Washington has this patent now that
6 describes lots of different methods for doing it. The method
7 of claim 36 is different than the other claims. The method of
8 claim 36 is specific and it's limited to the specific
9 combination of diffusion-weighted gradients and vector
10 processing in order to show the image separate from -- to
11 generate this data set. That's the point of novelty.

12 And when we get to enablement, we'll show enablement,
13 and when we get to anticipation, we'll see whether Siemens can
14 come up with any piece of prior art that shows a combination of
15 a predetermined arrangement of diffusion-weighted gradients and
16 vector processing. I have yet to see that prior art. But that
17 is the point of novelty of this claim.

18 So, Your Honor, in terms of your question of where do
19 we go next, if the court perceives that further construction of
20 processing as an ordinary term and not a step-plus-function
21 term is warranted, then I suggest that we go ahead and brief
22 that issue. We'll exchange --

23 THE COURT: What does "processing" mean?

24 MR. FENSTER: Exactly. We'll go ahead and exchange
25 proposed constructions. It's not something we did before

1 because the only issue was whether it was step-plus-function,
2 and Siemens didn't urge an alternate claim construction in the
3 event it lost the step-plus-function proposal.

4 So what I would suggest is if the court wants --
5 thinks that further explanation or construction or processing
6 as an ordinary term is warranted, let's have an expedited, or
7 not, claim construction process where we exchange terms and
8 brief it for the court to decide. I don't know that a separate
9 hearing is necessary, but the court -- that's obviously within
10 the court's discretion.

11 THE COURT: All right. Let's go on to the others.

12 MR. LoCASCIO: Your Honor, if I may. Before we get
13 there, I just want to raise one point. That's -- I think all
14 of us now agree that the analysis of Judge Rader in *Seal-Flex*
15 is what needs to be done; I contend the court has done that.
16 And indeed --

17 THE COURT: I have done that. I don't care whether
18 you think it's done in writing or we have covered it. That is
19 what prompted all this.

20 MR. LoCASCIO: And my point is only that the claim
21 language here, *Seal-Flex* says you have to look at it. And in
22 *Seal-Flex* -- ultimately, Judge Rader, when he does look at it,
23 says this is, despite the presumption, 112, six,
24 step-plus-function, but it does, in fact, disclose how to do
25 it. And in that case, quite differently than here. The two

1 verbs -- if we can think of that -- are "spreading" for
2 "adhering," and doesn't just say, Figure out how to adhere. It
3 says "spreading an adhesive tack coating," and the court
4 found -- or Judge Rader found that that was a description of
5 how to adhere the mat to the foundation.

6 THE COURT: Well, here's my problem: He wasn't
7 looking at a software patent.

8 MR. LoCASCIO: I agree. He found structure -- he
9 found a way to do it there because it described one. And I
10 think there is some analogy with respect to software patents,
11 given the federal circuit's -- call it criticism of generic
12 "processing means" claims. In the means context, the term
13 "processor" has been described and found to be insufficient to
14 satisfy. A "processing means" or a "processor" is not enough
15 without an algorithm. And those are the *Aristocrat* and other
16 cases that we've talked about in the original round on this.

17 And so I agree the uniqueness of a software
18 implementation, as here, if -- as we see in claim 36(e), here
19 "processing" to generate. The function, Your Honor, no one --
20 nothing in this claim tells one how to do it. And so just like
21 the analysis that *Seal-Flex* requires, the analysis here is,
22 Well, does that tell me enough about how do it? In *Seal-Flex*
23 they did. Here, they do not. And no one from NeuroGrafix
24 identifies any specifics in the claim where it would need to be
25 or either in the -- or even in the specification about how one

1 actually does that processing. And absent that, when you have
2 language here that has a function of generating a data set,
3 with the only thing perceived by even NeuroGrafix to be an act
4 of processing, whereby, every account, it's done through some
5 computerized means, that alone is insufficient to satisfy their
6 obligations under 112, six.

7 This is a case where the presumption is overcome and,
8 indeed, there is no description of how. The act, as it would
9 be argued by NeuroGrafix, of processing is just taking steps,
10 taking steps to generate. And if they said it that way, it
11 would be prima facie 112, six. They didn't. They used the
12 word "processing," but it had no description, Your Honor, of
13 the key question from all of the Federal Circuit precedents,
14 how to do it.

15 THE COURT: Let's go on.

16 MR. FENSTER: Your Honor, may I briefly address this
17 before we go on and lose the point? May I respond?

18 THE COURT: I will never lose the point that -- what
19 we're talking about.

20 MR. FENSTER: We're about to move to a different
21 motion. May I just respond on this?

22 THE COURT: Yes.

23 MR. FENSTER: Your Honor, Mr. LoCascio urges that
24 "processing" doesn't mean anything and it is, therefore, not an
25 act. It is contrary to the Federal Circuit's decisions. So in

1 *Cardiac Pacemakers*, the court looked at determining -- the
2 claim language in *Cardiac Pacemakers* was "determining a
3 condition of the heart from among a plurality of conditions of
4 the heart."

5 Now, two things about this: One I would submit, Your
6 Honor, that "determining" is no more generic than "processing,"
7 That "determining," which was found to be an act sufficient to
8 reverse a step-plus-function finding in *Cardiac Pacemakers*, is
9 just like processing. The steps of "determining" -- Mr.
10 LoCascio could make the exact same argument with respect to
11 "determining," and the Federal Circuit went the other way.

12 The other important point about *Cardiac Pacemakers* is
13 that this is software. How do we think that the determining a
14 condition of the heart was done? It was done with software
15 just like this. And, Your Honor, there is no support in
16 Federal Circuit or other case law that I found to suggest that
17 the step-plus-function analysis, as to whether a recited verb
18 is a function or an act, is different in the software claim, or
19 in a claim that involves software, than in a claim that
20 doesn't.

21 There is nothing to suggest -- and I haven't gone
22 through and specifically analyzed all of the cases to see did
23 this involve software or didn't it, but there has never been a
24 distinction drawn by the court as to determining whether
25 something is an act or a function based on whether or not

1 software is involved. And, Your Honor, just based on the few
2 cases that we have before us today, I would suggest that
3 *Cardiac Pacemakers* suggests that it doesn't and that that is
4 not a valid distinction to find a step-plus-function contrary
5 to the great weight of law.

6 Second, let me point out that *Caterpillar*, which is a
7 Northern District of Indiana case, which was cited by the
8 defendants for step-plus-function analysis, and it was affirmed
9 without opinion by the Federal Circuit. The *Caterpillar* case
10 involved four recited acts or functions. They were
11 "providing," "determining," "retrieving" and "using."

12 And this is at 961 F. Supp. at 1256, I believe, where
13 it says, "Claim one involves the actions of providing,
14 determining, retrieving and using."

15 Again, "determining," just like in *Cardiac*
16 *Pacemakers*, was found to be an act. It was not a generic. And
17 what Mr. LoCascio is now arguing, that it doesn't tell you how
18 you determine, is exactly the argument that was rejected in
19 *Masco*, where the Federal -- where the defendant argued that the
20 transmitting -- a force was a step-plus-function, but it
21 doesn't tell you how to transmit the force. And what the
22 Federal Circuit said -- is it rejected that argument. It said
23 that it doesn't have to tell you exactly how, it is enough
24 that -- transmitting a force does describe how the lever is
25 driven then into the cam. And it was the lower court that

1 reasoned that the word "transmitting," without more, does not
2 explain how the force is transmitted. That's exactly
3 Mr. LoCascio's argument here, that we don't say how the data
4 set is processed.

5 And what the Federal Circuit said is it reversed and
6 said transmitting a force does describe how the lever is driven
7 into the cam. Just as in this case, how the data set is
8 generated is by processing. And so we urge the court to find
9 that there is no step-plus-function.

10 THE COURT: All right. Let's go on.

11 MR. FENSTER: Thank you, Your Honor.

12 MR. LoCASCIO: My suggestion would be to go to the
13 conspicuity.

14 THE COURT: Fine. Let's do that.

15 MR. LoCASCIO: So, Your Honor, the first -- the
16 second tab in the slide that we handed up called "conspicuity"
17 are the slides I'm going to walk through now on this question.
18 And as Your Honor knows, in claims one, claims three, seven,
19 11, 12 and 18 and their dependent claims there is a conspicuity
20 of a nerve that is at least 1.1 limitation. And with respect
21 to that, what Siemens raised in its *Markman* briefing were two
22 questions: How does one calculate the conspicuity, and then
23 how would a user choose -- one of skill in the art choose an
24 ROI, or a region of interest, to measure that conspicuity.

25 And with respect to that second question, the court's

1 *Markman* decision identified that this was an open question.
2 Siemens made a persuasive showing that this underlying method
3 of selecting a region of interest -- on slide four of the
4 deck -- in the calculation of conspicuity is a subjective
5 inquiry that renders the claim indefinite. And what came out
6 of that from Your Honor's decision were two core questions: Do
7 experts agree on the method of making ROI selections and
8 whether the infringement or noninfringement would depend on who
9 actually makes that measurement, because that would be the
10 textbook case of indefiniteness if expert one for the plaintiff
11 says, I measured it, I used an ROI, it infringes; expert for
12 the defense says, I measured it, I used an ROI, it does not
13 infringe. The patent itself must in that situation disclose or
14 explain how one does that so that those calculations and the
15 question of infringement or noninfringement is consistent.

16 And based on Your Honor's order, we had a telephone
17 conference and we laid out a whole plan to deal with this, and
18 the plan was we'd have nonexpert discovery, we'd have expert
19 reports -- and both sides submitted them -- and then we'd file
20 briefs. And for Siemens, Dr. Bryan, who was the expert
21 specifically on this question of conspicuity, he's new to this
22 phase for the -- pardon me -- for the defendants. For the
23 plaintiff, it's Dr. Brant-Zawadzki. Dr. Bryan and
24 Dr. Brant-Zawadzki are practicing radiologists. The core
25 difference between them, insofar as it matters for this motion,

1 is Dr. Bryan actually calculated regions of interest in
2 conspicuity measures. Dr. Brant-Zawadzki for NeuroGrafix,
3 before he was retained in this case has never done so for a
4 nerve that would qualify under any of these claims, and in the
5 course of his retention, was neither asked to nor performed a
6 single ROI or conspicuity calculation.

7 Prior to this round, in the original *Markman*
8 submissions, there were -- each side had an expert:
9 Dr. Moseley for NeuroGrafix, he had done ROI and conspicuity
10 calculations, and Dr. Filler, one of the inventors of the
11 patent at issue, and the plaintiff, he had also done ROI and
12 conspicuity calculations.

13 To the court's question: Is there an agreed-upon
14 standard in the field for creating or drawing an ROI? All the
15 evidence in this case is no. There is no standard.
16 NeuroGrafix concedes the point, and we'll walk through that.

17 Second, does the patent leave it to the user, or does
18 the patent, despite their no industry standard, tell you this
19 is how one does it, and the answer is no, the patent does not,
20 and we'll walk through that.

21 Third, which is the second part of Your Honor's
22 question is, okay, if there's no instruction of how to do it,
23 if it's done differently, do you get to different results?
24 Because at base, if you do, the claim is indefinite. And I
25 want to walk through the fact that we have expert testimony,

1 both documentary records and publications that say there is a
2 difference -- if you do it differently, you get different
3 results. Indeed, Dr. Filler's own calculations showing that
4 the same person can end up falling within the claim on image
5 and falling outside of the claim.

6 Specifically, with respect to is there a standard.
7 We have on slide nine, Dr. Brant-Zawadzki for NeuroGrafix had
8 never done so before for a nerve. His knowledge of ROI comes
9 in other context, but even on that, he says there is no
10 industry standard.

11 First, data point on this is defendant's
12 uncontroverted facts, on summary judgment motion, was there is
13 no industry standard for selecting an ROI, there is no one way
14 in the industry. NeuroGrafix's response to that is not to
15 dispute that fact. They dispute it's a material fact. We can
16 debate that. It's not a material fact in dispute because we'll
17 see their own expert says there is no standard. They only
18 dispute that to the fact that the extent that implies
19 conspicuity is not taught.

20 So with respect to the uncontroverted facts, they
21 don't take issue with the fact that there's no one standard.
22 Dr. Bryan in his opening report says there's no recognized
23 standard, and when you ask Dr. Brant-Zawadzki, who didn't say
24 anything about this in his report, is there an industry
25 standard? Do you disagree with Dr. Bryan? He says -- this is

1 on slide 11 from the deposition -- Well, there's no industry
2 standard one way of doing it.

3 The parties -- the experts agree that there's no
4 industry standard to do it. The literature in the field
5 confirms that. Despite many ROI options, there's no consensus.
6 This is an article -- the Ozsunar article that is cited in
7 Dr. Bryan's report.

8 On slide 12, what actually is the language of
9 specification, and this is what Dr. Brant-Zawadzki for
10 NeuroGrafix looked at when he said there are a lot of different
11 ways you can do it, and the patent, indeed, tells you -- for
12 lack of a better term -- use whatever you want to do it. It is
13 left to the user. This is column 14, lines 54 to 62. Each ROI
14 may be a single pixel or voxel, or a larger region.

15 ROI selection can be performed manually, for example,
16 to moving a cursor around and over the ROI. Alternatively, it
17 can be accomplished automatically.

18 So the specification doesn't tell you to use a
19 particular method or there is one to be used for this patent.
20 It says the ROI to be used in this analysis can be used in a
21 variety of ways, and it is left to you.

22 If it's done manually, there's no instruction or
23 direction about that size, what shape, how to place the ROI.
24 If it's done automatically, it doesn't tell you what algorithm
25 to use, what settings to use or anything of the sort. So the

1 specification doesn't teach you which method to use. The
2 experts agree on this.

3 Siemens' expert, Dr. Bryan, says it simply leaves
4 open the possibilities of using any method of selecting an ROI,
5 of which there are many. NeuroGrafix's expert,
6 Dr. Brant-Zawadzki, agreed in his deposition. This is slide
7 14, his dep at 108 to 109. The patent itself says there can be
8 a host of different ways to do it. He says it gives examples
9 of three, I guess, right there. And I said:

10 *"One is single pixel or voxel, one is automatic, one*
11 *is a larger region selected manually.*

12 *"Correct.*

13 *"QUESTION: It doesn't say which of those is the right*
14 *one to use or which of those to use to determine*
15 *conspicuity, correct? It leaves that to the operator.*

16 *"ANSWER: Right.*

17 *"QUESTION: You'd agree with me different operators*
18 *could select different methods of selecting the region of*
19 *interests?*

20 *"ANSWER: Yes."*

21 There's no disagreement from either side that the
22 patent leaves it to the user. They admit it allows -- even
23 NeuroGrafix's opposition brief, which now tries to point to a
24 particular method, which I'll get to, this thresholding idea,
25 they even in their own brief say, Well, there are other methods

1 that the patent teaches, as well. So even now, faced with the
2 prospect of this being definite, they still can't point to
3 because there is no place in the patent specifically tells you
4 how to do it.

5 Their fallback argument to this is, Well, we couldn't
6 have be more precise. We said everything we could say to the
7 user about this.

8 Their own expert, and the literature, show that to be
9 not -- that's not the case. First, we've got references first
10 on this slide 17, is the reference called Bonekamp witnesses --
11 Dr. Bryan talks about this; Dr. Brant-Zawadzki was asked about
12 in his deposition. This is example in the art of how people
13 describe an ROI when they want consistency -- when you want to
14 know if someone down the road can do the same calculation and
15 get a consistent, predictable result.

16 And here you'll see in this Bonekamp reference, eight
17 lines of text telling the user, Here's how to do it. Use an
18 ellipsoid ROI. Place it on the long axis of a particular fiber
19 track. The size is to be 16 pixels from a particular matrix.
20 There are -- even says "Raters were given a template in
21 performing the evaluation." So it could certainly have been
22 described more specifically than it's described here in the
23 patent. Other articles that collected in our brief in footnote
24 seven point to the same thing, and similar detailed
25 descriptions if you want to have an ROI that leads to a

1 consistent result, this is how you would do it.

2 NeuroGrafix's expert -- slide 18 -- was asked the
3 same thing. "You'd agree there are more specific ways to
4 prescribe how an ROI is set forth than what's in this patent."

5 He said, "You can be more specific in prescribing
6 how, for a given purpose, to determine an ROI. We then talked
7 about the Bonekamp article from his deposition, page 170, about
8 all the specifics. He said, "Does the '360 patent provide
9 those sort of details?"

10 Answer -- the first answer was "That's not the
11 purpose of the patent."

12 But then when asked, "Does it describe that or not,"
13 he says, "No, it does not."

14 I also disagree with his first answer, which is "it's
15 not the purpose of the patent." In this situation, when you're
16 telling people to make a mathematical claim of conspicuity
17 based on two regions of interest, if those regions can lead to
18 different results if created differently, you do need -- it is
19 the purpose of it, to tell someone how to make it.

20 Without a standard in the field, or a particular way
21 described, users don't know how to do it. They're left to
22 their own devices, and we know, and the evidence in this case
23 shows, that different ROIs can lead to different intensities,
24 ergo the calculation of conspicuity is different. First look
25 at literature.

1 This is slide 20.

2 The Krak reference at 294, the method of ROI
3 determination definition has a direct influence on quantitative
4 outcome. It is not, as NeuroGrafix suggests, irrelevant how to
5 come up with one because the outcome will be the same.
6 Depending on how you choose the ROI, you'll get a
7 mathematically different answer. The Oxidal reference says the
8 same thing. Subjective placement of the ROIs impacts the data.
9 It's a collection of articles like that in our brief at
10 footnote eight.

11 The experts' work in the case confirms that. All
12 working from the same images that originated actually from
13 Dr. Filler. This is Dr. Bryan's analysis. Choosing -- if you
14 see on the right side, you'll see faint yellow lines pointing
15 to small circles that are all in a nerve. And what those show
16 at different ROIs, there's different means signal intensity,
17 and that range, Your Honor, is not a percent or two difference.
18 These are not -- as the case law would say, it would need to be
19 to not be indefinite, either equivalent or substantially
20 equivalent that you get to the same result. We're looking at a
21 range of 60 percent differences. And, here, where that leads
22 to a conspicuity calculation of 10 percent difference between
23 neural and non-neural tissue makes all the difference, as we'll
24 see.

25 Dr. Filler, in his original report, prior to Markman

1 gets to the same conclusion. He measures the signal, average
2 signal intensity in the lung, which is the non-neural tissue
3 analysis. And those numbers range from 13 to 19. It's a
4 40 percent difference. Dr. Moseley, same thing, depending on
5 how you set up your ROI, you can get dramatically different
6 results for what that intensity is.

7 Now, in response, all NeuroGrafix points to is a cite
8 to Dr. Bryan. The top of the slide is their brief, footnote
9 ten. And what it says is, Bryan suggests the signal intensity
10 will not change meaningfully if different sizes and shapes of
11 selected ROIs are used. That's not what he said, nor is that
12 the record evidence in this case, and if you look what we've
13 put below is the actual dep testimony that they pointed to.
14 And what Dr. Bryan says there is when asked about a
15 hypothetical that doesn't exist in practice, which is a purely
16 homogenous structure, meaning every pixel in that structure has
17 the exact same signal intensity and there is no noise at all in
18 the measurement, if you selected an ROI entirely within that
19 hypothetical homogeneous noise-free section, well, yeah, you'd
20 be taking an average of identical numbers. So there would be
21 no difference, except, depending on where you place it, it
22 could still be different.

23 So that quote by no means supports this
24 broad-sweeping proposition that the signal intensity will not
25 change meaningfully if different sizes and shapes are used.

1 Their own witnesses, Dr. Brant-Zawadzki and Filler, say
2 otherwise.

3 In response, NeuroGrafix repeatedly says in its
4 brief, "This method is definite and repeatable." They say -- I
5 think we cite six on the slide, on slide 25. There might be a
6 couple others as I remember the brief. None of those point to
7 any evidentiary support at all. The idea that the selection of
8 a region of interest, that the teaching this patent will show
9 definite and repeatable -- I know why NeuroGrafix wants to say
10 that, because that would support the idea that you don't get a
11 different result. The fact of the matter is not does the
12 patent teaches how to do, nor does the actual evidence show it.

13 And what we have on the next handful of slides is
14 the -- are the expert disclosures that have been put in, in
15 this case. On the left -- slide 26 -- Dr. Filler's calculation
16 on a particular image, and he says the conspicuity in that
17 instance is 1.4. Using ROIs that are, again, in the nerve and
18 in the same section of non-neural tissue Dr. Filler selected,
19 could he select two ROIs that lead to a calculation of 1.4?
20 Sure. But you could just as well -- one of skill in the art
21 could choose, as you see on the right side, figure six on
22 Dr. Bryan's report, choose ROIs in the nerve, ROIs outside of
23 the nerve, and get to numbers that are underneath 1.1.

24 So the core question of could two people skilled in
25 the art, based on the open-ended teachings of this patent of

1 choose an ROI, however you see fit, lead to different
2 calculations? It's not only -- call it Filler v. Bryan, or
3 Brant-Zawadzki -- he doesn't do any calculations -- but Filler
4 v. Bryan or Filler v. Moseley, Filler's own calculations --
5 Dr. Filler ran calculations of the plexus versus the lung --
6 and these are figures five, six and seven from his February 1
7 report -- Feb. 2011 report on slide 27. The same exact image,
8 the same exact scan, he chooses three different sets of regions
9 of interest.

10 And at first glance, these may not seem to be an
11 issue because these are all larger than 1.1. But there are
12 claims, specifically claim 19, that has a similar conspicuity,
13 no one argued it should be calculated or deemed any different,
14 and that claim says it has to have a conspicuity of five. And
15 what Dr. Filler's three analyses here confirm is that even the
16 same person, even the inventor, when he runs these calculations
17 with different regions of interest, gets, in one instance,
18 conspicuity above five, meaning infringement. And in two
19 instances, gets conspicuity below five, meaning no
20 infringement. It is the same scan that he's looking at.

21 The expert for NeuroGrafix, Dr. Brant-Zawadzki, when
22 shown these is asked, Well, with respect to this image, three
23 different ROI settings lead to one satisfying claim 19 and two
24 not. He says with respect to the same data, this is the
25 question in his deposition, line 188.

1 THE REPORTER: Line what?

2 MR. LoCASCIO: 180 -- page 188, I'm sorry.

3 Same data, same scan: "Depending how you measure it,
4 it would satisfy claim 19 or not satisfy it, depending on the
5 ROI selection, true?

6 "ANSWER: Yes."

7 In the brief, NeuroGrafix ignores all of this test
8 data, all of Dr. Filler's original calculations, Dr. Bryan's
9 calculations, and just says the nerve was always significantly
10 more than 1.1 times as conspicuous than the lung except one of
11 the claims is a good example of why that alone isn't enough,
12 because we saw in claim 19, the conspicuity calculation is
13 different depending on the ROI, and that's the core question
14 here. And even with respect to 1.1, Dr. Filler's
15 calculation -- this is shown in slide 30 -- is 2.2 or 2.31;
16 Dr. Bryan ran different ROIs on the same image and got examples
17 under 1.1.

18 Same thing on slide 31.

19 Dr. Filler gets 1.4, Dr. Bryan calculates things
20 above and things below 1.1, all depending on just where you
21 place and how big and how -- what size is your region of
22 interest.

23 Yet another example, on slide 32 and on slide 33.
24 The response to that from NeuroGrafix is these are irrelevant
25 because Dr. Filler, their position is now Dr. Filler's original

1 and only expert report to this court and to Siemens Medical
2 Solutions was not actually attempting to do ROI calculations,
3 consistent with the '360 patent, well that is not what his
4 report was submitted for. His report was originally submitted
5 to show how to calculate conspicuity to support NeuroGrafix's
6 *Markman* position and how on calculate conspicuity, inherent in
7 that requires calculating an ROI.

8 And so to suggest now that Dr. Filler's calculations,
9 which confirm different ROIs lead to different results, is just
10 a -- I think their word is it's informal, it's not a formal
11 conspicuity analysis, it's an informal conspicuity analysis.
12 It's a conspicuity analysis submitted to this court for the
13 purpose of net determining whether something has a conspicuity
14 of 1.1.

15 And under that, his own selection of ROI was not, as
16 they would suggest now, slip shod and not consistent with one
17 of skill in the art. What it is, is it now undermines their
18 position so they want to not have to be held to what Dr. Filler
19 said. Even if you ignore Dr. Filler's calculations, what is
20 clear from the literature, from both experts, on the question
21 of regions of interest, is patent didn't tell you how to do it,
22 and if you do it different ways, you can get to different
23 results. Dr. Brant-Zawadzki actually says the method Filler
24 used that NeuroGrafix now wants to distance themselves from, '
25 is how' the '360 patent teaches it. He says the same thing,

1 slide 35 -- that both Dr. Bryan and Dr. Filler perform an ROI
2 calculation in their original reports which is the data we just
3 looked at, consistently with the '360 patent.

4 Whereas here, there are multiple ways of determining
5 the scope of the claim and the patent doesn't tell which way to
6 do it -- this is *Honeywell, Geneva Pharmaceuticals* -- that is
7 the epitome of indefiniteness because it could just as easily
8 be infringing, as non-infringing, and it depends not on what
9 the claim describes but on a subjective analysis, Your Honor,
10 and --

11 THE COURT: All right.

12 MR. LoCASCIO: With that --

13 THE COURT: You've made the point.

14 MR. LoCASCIO: Thank you.

15 THE COURT: Mr. Fenster.

16 MR. FENSTER: Your Honor, this claim limitation that
17 we're looking at, the patent does have this limitation that
18 limits the claims to the requirement that there be a
19 conspicuity of nerves of 1.1 relative to background tissue.
20 It's undisputed that what that means is that it requires that
21 the nerve be exactly at least 10% brighter than the surrounding
22 tissue.

23 THE COURT: Yes.

24 MR. FENSTER: Now, that seems -- that looks to be a
25 very specific requirement, but the court raised some questions,

1 as did Siemens Medical Solutions, about how you calculate
2 conspicuity, and first they asked, what formula do you use. No
3 formula; the patent doesn't tell you.

4 Then he pointed the court to the formula in the
5 patent, where it says -- where it defines conspicuity as
6 contrast, and then teaches that contrast is the ratio of SN
7 over SM -- this is in the patent at column 22, where it says,
8 "A nerve-to-muscle contrast parameter, R, was then computed as
9 the ratio of S sub N, divided by S sub M, for muscle, and the
10 court found in its claim construction order that while
11 difficult, because this is a long patent and this is one line
12 therein, the court could construe conspicuity as this ratio.
13 But the court asked for guidance. Well, is it subjective how
14 we determine this, how we calculate this ratio? The court
15 asked two questions: First, 23, please.

16 First, how would a person of ordinary skill in the
17 art identify whether something is nerve or background? And
18 then second, how would a person of skill in the art select the
19 regions of interest and is that a subjective query?

20 So we showed -- and I don't think it's disputed --
21 and Siemens Medical Solutions hasn't raised it here -- that one
22 of skill in the art does know how to select the nerve. And
23 next slide, it is undisputed that the patent teaches how to
24 select the nerve. That one can select the nerve just by gross
25 anatomy and that the patent specifically teaches two methods

1 sufficient to identify nerve when gross anatomy is not enough,
2 and that is that the -- to identify presence of the fascicle
3 pattern -- that is at column 27, lines four through 28,
4 line 26, and that also teaches additional method of the
5 combination of diffusion weighting and fat suppression. That
6 is at column 22, lines 33 through 36.

7 There is no real dispute, I don't believe, that at
8 this point, that one of skill in the art does know how to
9 identify a nerve, and so I will not go to what the patent
10 teaches about how you select regions of interest.

11 The experts, Your Honor, I don't know how you parse
12 through when you have competing experts, and the experts are
13 all over the place on this. So what I do know is that the
14 expert testimony is extrinsic. What is really important is
15 what the patent says. And what Siemens posits, and the
16 question before the court is, does the patent tell you how to
17 calculate the region of interest? And, Your Honor, it does.

18 First, there are two regions of interest we have to
19 identify: The first is the nerve. That's the numerator in the
20 ratio. And the second is the background tissue, right? So
21 that's the denominator in the ratio. So, first, with respect
22 to the region of interest for the nerve, the patent tells you
23 how to do it.

24 This is slide 26.

25 It says you use a thresholding process. It says at

1 column 20, lines two to seven, a thresholding process is used
2 to identify relatively bright regions of the image potentially
3 representative of nerve. With the boundaries of these regions
4 established, the intensity of the pixels associated with each
5 region is evaluated and average image intensities for the
6 regions are computed.

7 Now recall, that the ratio that we -- that the court
8 found described in the patent as the contrast parameter is SN
9 or SM, those are average intensity. This is telling you how
10 you calculate the average intensity for the nerve. You use a
11 thresholding process. It describes that again in slide 27 at
12 column 30, lines 58 to 76. The system then determines the
13 boundaries of the imaged nerve in each of the two dimensional
14 images available using a thresholding process. The patent
15 tells you how to do it.

16 What does that mean? Slide 28. So this is from
17 Exhibit 20 to Dr. Filler's declaration, this is just to
18 illustrate what thresholding means. So first what he did is he
19 selected a point on the nerve -- this is slide 28 -- I'll do
20 this on the Elmo, Your Honor. These are the same slides.

21 So this is slide 28 -- this not as good -- where he
22 selects a point within the nerve and then he uses a
23 segmentation algorithm. So this is built-in software. Let's
24 go back to -- I apologize, Your Honor.

25 At the top right, it shows that these are

1 segmentation parameters, and there's an algorithm that says
2 threshold. I don't know if Your Honor can see that, about four
3 lines down on the right side?

4 THE COURT: Yes, I can see it.

5 MR. FENSTER: Thank you.

6 If you go to slide 29, this is the thresholding.
7 What you do is you set an intensity above which the image is
8 shown or it's highlighted and anything below the threshold is
9 not highlighted. If you set it up to 83, it highlights the
10 nerve. Eighty-three is the interval that is highlighted on the
11 right about mid level, do you see where it says 83 interval?

12 THE COURT: Yes.

13 MR. FENSTER: Okay. The next slide, slide 30, takes
14 it one. If you go up, if you do that interval of up one notch
15 to 84, you get a lot of stuff that is clearly not nerve.
16 That's what the thresholding process is. You use the slider to
17 identify the nerve, and when you go too far, you get clearly --
18 you get stuff that is clearly not nerve. So you back it down
19 to 83 and that's how you identify the nerve.

20 So the nerve is selected using the thresholding
21 process and you take the average intensity of that nerve. Next
22 slide.

23 That -- using that thresholding process, by the way,
24 is -- basically it gives you the same result as Dr. Bryan did
25 in his opening report. Next slide.

1 Okay. So the patent teaches you to use the --
2 teaches one of skill in the art to use this thresholding
3 process for the numerator to find the average intensity of the
4 nerve. You select the region of interest by thresholding, and
5 you select the whole nerve, you take the average of it. That's
6 what the patent says to do. Now, how do you determine the
7 non-neural tissue? Two different sets of claims that -- and
8 the language of those dictates different results. Claim 18 --
9 next slide -- so first, claim 18 says that you need a
10 conspicuity of the nerve that is 1.1 relative to any adjacent
11 non-neural tissue. So here, claim 18 dictates what the
12 non-neural tissue is. It is any adjacent non-neural tissue.

13 In other words, you find an adjacent tissue and you
14 select the whole thing. That is dictated by the plain claim
15 language, and it is from Exhibit 15 to Dr. Filler's
16 declaration, and what I've done is just illustrated this part
17 here is the nerve, this is the adjacent non-nerve, and what
18 he's done is just selected the non-nerve tissue and takes the
19 average of. That's what claim 18 says to do.

20 The other claims, claims one, three, seven, 11 and
21 12 -- slide 34 -- 11, don't specify which non-neural tissue.
22 They say the non-neural tissue. Here we have to look to the
23 specification. The specification does tell us which region of
24 interest to use for the non-neural tissue. Slide 35.

25 What the patent did and what it discloses, is using a

1 two centimeter elliptical region of interest. At column 27,
2 lines 29 through 43, what it says is images from the second
3 series were post-processed by selecting manually an elliptical
4 region of interest, approximately two centimeters in diameter
5 around the sciatic nerve in each of the sections. The patent
6 tells us how to select the region of interest. Just as it
7 said, the contrast parameter was calculated using the ratio.
8 It says the region of interest was selected as the two
9 centimeters surrounding the nerve, and that is illustrated at
10 figure 22 of the patent.

11 So let me take you to the Elmo. So this is
12 column 27. This is what we just looked at where it says images
13 from the second series were processed by selecting an
14 elliptical region of interest approximately two centimeters in
15 diameter. That's at line 30 on column 27.

16 It then goes on in the next paragraph to show is that
17 these are illustrated in the figures, and figure 22 shows an
18 axial protection of the nerve including the graft. So
19 figure 22 shows this two centimeter region of interest. This
20 is figure 22 from the patent. And this image is a little hard
21 to see, so I got the original images from which this data set
22 was created. But what it shows, this is a reverse image where
23 the dark is the sciatic nerve and the white stuff around it is
24 the background tissue. This is a two centimeter of interest.
25 This is axial. What they did is they took a two centimeter

1 ellipse in cross-section and stacked those up to get the
2 two-centimeter cylinder that is shown on figure 22.

3 Let's go to slide 37. So, Your Honor, I apologize
4 for the bloody image on the right. This is the original image
5 from which figure 22 was generated. As you can see at the top,
6 it says University of Washington Research, this was dated
7 December 1st, 1992. Do you see that at the top?

8 THE COURT: Yes.

9 MR. FENSTER: So this is the original image which
10 figure 22 was shown and you can see that side by side if we
11 just go briefly to 46. So 46 shows on the left, the image that
12 we're looking at, the original image, and on the right is
13 figure 22 from the patent. Though it's not quite scale, you
14 can see that they're the reverse image of each other. That the
15 nerve shown in white on the left is shown in dark on the right,
16 but that that is the exact same image of the sciatic nerve that
17 is described in the patent.

18 Do you see that, Your Honor?

19 THE COURT: Yes, I do.

20 MR. FENSTER: So let's go back to 37 and look at the
21 original image.

22 The original image shows a -- the neurogram that was
23 generated using the image and the region of interest -- the
24 two-centimeter region of interest that was selected, that is
25 shown in figure 22 on the left, and on the right, you see the

1 operative -- the surgical paragraph that was taken during
2 surgery. And at the top, what they're doing is pointing to the
3 sciatic nerve. This sciatic nerve was cut by a knife, and if
4 you can look right in the middle of the image on the right, you
5 can actually see some little black sutures where it goes from
6 being, sort of, a nice, normal image of the sciatic nerve to an
7 injured portion of the nerve. In the middle there are little
8 black sutures. That's where they sewed the nerve back
9 together.

10 On the left is the neurogram using the invention that
11 was shown of that nerve. And the patent tells you and
12 illustrates if figure 22, taking this two centimeter region of
13 interest, those are the three components that we need to
14 calculate conspicuity. You identify the nerve, you take the
15 region of interest of the nerve, it's determined by
16 thresholding, and you divide it by the region of interest of
17 surrounding tissue and the patent says to use a two centimeter
18 surround.

19 The patent discloses how to do it.

20 Now, let's go to 41. We originally proposed that the
21 court construe conspicuity as the continuing arrest as it's
22 defined in the patent where it's defined exclusively as the
23 contrast between the nerve and any adjacent non-neural tissue
24 as least 1.1 times. Indefiniteness -- the Federal Circuit law
25 in indefiniteness says that claims are presumed valid and that

1 we shouldn't invalidate a claim unless a narrowing construction
2 cannot properly be adopted. That's in the *Microprocessor*
3 *Enhancement* case on slide 20.

4 So what we would propose in terms of narrowing
5 construction is the following: This is on slide 42: So we
6 would propose the following narrowing construction consistent
7 with the specification: Contrast, conspicuity should be
8 defined as the contrast in, for example intensity and color,
9 between nerve and any adjacent non-neural tissue at least 1.1
10 times. Then specify how to contrast is calculated as described
11 in the patent. Contrast is calculated by dividing, one, the
12 average signal intensity of a region of interest of nerve as
13 determined using a thresholding process, by, two, the average
14 signal intensity of the non-neural tissue, for claim 18, region
15 of interest for the non-neural tissue is the brighter adjacent
16 non-neural tissue, and for the other claims, the region of
17 interest is the non-neural tissue. It's an approximately two
18 centimeter ellipsoid surrounding the nerve.

19 That is the best guidance that we have from the
20 patent. The patent is not perfect, Your Honor, and I wish that
21 it said this is the only way to do it but it doesn't. But it
22 does disclose how to do it. Just as the court struggled to
23 find that the contrast could be calculated using the formula,
24 the ratio, we ask you to find that the court -- that the
25 regions of interest are specified. It does tell the reader

1 that they used threshold, and they used the two centimeter
2 region of interest for the non-neural tissue.

3 Unless you have any questions, Your Honor?

4 THE COURT: No.

5 Please.

6 MR. LoCASCIO: Your Honor, pardon the expression, but
7 this question of regions of interest is in some ways from
8 defendant's perspective, whether it's herding cats or whack a
9 mole or whatever you want to call it, this proposed
10 construction from NeuroGrafix never existed and they did not
11 take the position that the patent specified how to calculate
12 regions of interest in this manner until their opposition brief
13 via attorney argument and a belated submission from Dr. Filler.
14 The process in this case was we had a whole *Markman* hearing and
15 we identified this.

16 THE COURT: I know.

17 MR. LoCASCIO: We had an expert process.
18 Dr. Brant-Zawadzki, NeuroGrafix's expert, does not say any of
19 the things that Mr. Fenster just walked through. He doesn't
20 say it needs to be done by thresholding. He never even
21 mentions the two-centimeter portion of the specification. I
22 want to walk through what the specification actually shows to
23 respond to Mr. Fenster. Even now, this position continues to
24 evolve and change.

25 Our Exhibit 15 -- if we're incorrect about this, I'm

1 sure Mr. Weiss will point it out -- to the Filler declaration I
2 have is not the alleged Exhibit 15 that Mr. Fenster just put on
3 the screen. This color document, this slide, slide 37, that
4 Mr. Fenster showed, put it on the Elmo -- was never produced,
5 has never been turned over in discovery, it's not even in the
6 late Filler submission. The first time we saw it was this
7 morning, with these decks, and, let's step back, it frankly
8 doesn't tell anyone who is reading this patent anything since
9 it's not in the patent. It doesn't even have the two
10 centimeters on it on the right side.

11 But this concept of the evolving and moving
12 interpretation of how to construe conspicuity, how to determine
13 the region of interest, is an effort in the face of -- as
14 Mr. Fenster puts it, a patent they don't like the way it's
15 written. That is how the patent is written. We have to
16 construe it based on the actual patent and on its specification
17 and file history. None of that supports what we're now hearing
18 on opposition to this conspicuity motion from NeuroGrafix. The
19 actual patent says, for instance, column 14 --

20 THE COURT: Wait a minute.

21 MR. LoCASCIO: -- line 53 to 62 --

22 THE COURT: Wait a second.

23 MR. LoCASCIO: Sure, Your Honor.

24 THE COURT: What line are you on?

25 MR. LoCASCIO: I am in column 14, line 53, Your

1 Honor. If it helps, I'll put it up on the screen.

2 THE COURT: No. Go on.

3 MR. LoCASCIO: Okay. It says one or more regions of
4 interest within an image can be identified. Each ROI may be a
5 single pixel or voxel or larger region. It can be done
6 manually; it can be done automatically. Mr. Fenster and
7 NeuroGrafix's position is the determination of an ROI for the
8 nerve is different than it is for the non-neural tissue. And
9 for the nerve, it need be automatic via a thresholding process.
10 First of all, that is inconsistent with the language of the
11 specification, column 14.

12 It even then says after you do one of these methods,
13 what I've highlighted in line 63 and 64, next you calculate the
14 average image or pixel intensity within that ROI. What
15 Mr. Fenster pointed out, if this is how you get conspicuity:
16 Calculate this average of intensity from the ROI. It's right
17 here in column 14, which as the specification gets to that
18 point, this is in the section if you go back to one page, to
19 column 11, this is all within the heading of neurography
20 system. "Neurography" being the term plaintiff used to
21 identify nerves in MRI image.

22 In that process, this is how you can calculate an
23 ROI. Doesn't say have to, it gives you full latitude to do so.
24 What NeuroGrafix points to -- and I note -- points to now for
25 the first time is that we ought to look at column 27, 28 on

1 this issue -- columns 27 and 28 contain both the two centimeter
2 reference NeuroGrafix points to and this thresholding concept.
3 And the intro to that section is the fascicle identification
4 and nerve enhancement. And so they're talking about in a
5 specific process of identifying fascicles which is what all of
6 this points to, and actually figure 22 that Mr. Fenster shows
7 is preceded by two other figures showing a cross-section of
8 that nerve, identifying fascicles, these are figures 20 and 21.
9 Twenty showing in the middle there, that same sciatic nerve,
10 calling them white dots inside of a larger white circle, zoomed
11 in, in figure 21.

12 Sure, one way of doing it for fascicular
13 identification is described as thresholding. We'll get to it
14 in a second. It doesn't tell you how you go about that, any of
15 those settings Mr. Fenster puts on the screen, none of those
16 are in the patent at all. But to suggest that this passage
17 is -- now governs region of interest calculations across the
18 whole patent would read out the very language in column 14 on
19 how to use a neurography system, namely, select an ROI, in a
20 host of ways.

21 So coming back to defendant slide deck, both expert
22 reports, both experts point that what language column 14 says,
23 this is what the patent describes. In the face of that,
24 NeuroGrafix now points thresholding, and the two centimeters
25 they do so through attorney argument because the only

1 alternative to that would be to say that the Filler declaration
2 they put in with their opposition is expert testimony, which is
3 a bit of a catch-22 for them because they don't want to say
4 that because then they would be frontally violating the
5 scheduling order and the disclosure obligations they have. So
6 instead they now had to back up to the position of it's not
7 even evidence what is in the Filler declaration.

8 In their opposition to the motion to strike, they say
9 it's neither expert testimony nor even fact evidence that the
10 court can rely on. It is purely demonstrative. Well, then all
11 it is demonstrative of is attorney argument to try to avoid
12 what their own expert testimony is, Your Honor. This is a --
13 the fourth or fifth definition NeuroGrafix has put forth for
14 how to calculate the ROI, and it is, in my view, Your Honor,
15 the last-ditch effort to find a way around the actual language
16 of the patent.

17 The patent doesn't tell you how to do it and they
18 have to acknowledge because their own calculations show it that
19 if you do it different ways, you get to a different result.
20 This Filler submission, Your Honor, as we've talked about, it's
21 after the expert deadline, there's no ability to really respond
22 or depose Dr. Filler on it, but they argue this thresholding
23 process is somehow used to draw ROIs for conspicuity. Indeed,
24 they say it has to be the way to do it. And contrary to his
25 report and their brief, Dr. Filler himself, before we knew this

1 was going to be his story, either sheer happenstance or I am
2 incredibly prescient, Your Honor, when we deposed Dr. Filler
3 six months or, though I don't have the date on here, he was
4 asked about this language and how you calculate conspicuity,
5 and he said, This fascicle identification approach is not what
6 we're calling conspicuity. This is from page 123 in the
7 deposition.

8 THE COURT: I've read it.

9 MR. LoCASCIO: Dr. Filler himself, when he was
10 actually deposed, when he put in an actual expert report, said,
11 This is not the way to do it.

12 Their expert then comes in, in the wake of that, and
13 says it does not describe a way to do it. Even if you were to
14 say, okay, despite all of that, thresholding is now going to be
15 the way the patent describes it, Dr. Bryan, and even
16 Brant-Zawadzki, admit in their deposition, this description of
17 thresholding -- this is slide 41 -- is so vague as to be
18 useless. It doesn't tell you -- all of the settings, when you
19 look at that screen shot Dr. Filler submitted with the
20 opposition brief in a minute -- that determines the results of
21 your thresholding. It's not however you do it, you get to that
22 result. Dr. Bryan and Brant-Zawadzki say it doesn't tell you
23 how to threshold the image, and so that's great. You can use
24 one automatic method being called thresholding, but it doesn't
25 get you there.

1 Dr. Bryan showed -- and these are materials we
2 submitted in his timely expert reports, what you see in the
3 left is the overall image, and what thresholding basically is,
4 is if you think about, if you have a contrast dial, which is
5 now a button --

6 THE COURT: I know.

7 MR. LoCASCIO: -- on your TV, if you turn it down
8 enough, it goes black. If you turn it all the way up, the TV
9 goes white, and somewhere in between certain pixels lit up,
10 depending how bright they are vis-a-vis the rest of the image.
11 And thresholding just says we're going to cut it off at a
12 point. And what showed on the right side is a 60% threshold.
13 So we will take the 60% brightest images or brighter pixels on
14 that image. And what it shows is you can't see any -- not
15 many, very few to no, non-neural tissue -- pardon me, neural
16 tissue. What you see there is bone and other things show up
17 from the thresholding. So just the concept of putting a
18 threshold in on the images at issue doesn't automatically make
19 the nerves just pop out; you have to do a lot more than that,
20 and there's no description of how to do it. Dr. Bryan was
21 asked, Could I use the thresholding to select the bright areas
22 of nerves? That answer to that question is no.

23 So what Dr. Filler submits is his report doesn't
24 simply use thresholding. It's a specific segmentation
25 algorithm using this Osirix software -- this will not be a

1 surprise, none of this is anywhere in the specification or the
2 patent. It doesn't say -- the patent doesn't say use this
3 what's called region growing algorithm, it doesn't say how to
4 do the threshold, it doesn't tell you any of these settings he
5 particularly applies.

6 Is this a way one could not do it? Sure. It's not
7 "the" way the patent describes. The patent says nothing about
8 this other than use automatic thresholding unless, of course,
9 you want to use pixel, voxel, or manual settings.

10 THE COURT: I have the point.

11 MR. LoCASCIO: These choices, Your Honor -- the last
12 point I want to address is the two-centimeter issue. They
13 point to column 27 and the two centimeter ellipse. They say
14 that that should be the way you construe ROI calculations for
15 conspicuity for non-neural tissue. It's a matter of first
16 principles: The idea that the patent where it talks about
17 conspicuity is suggesting -- as Mr. Fenster must now fall back
18 to -- to use different methods to measure and determine the ROI
19 for neural versus non-neural -- claim 18 versus the other
20 claims -- is not how you ought to construe these claims, it
21 doesn't make sense.

22 But even their own language, claim 27 talking about
23 the sciatic nerve says this region of interest, two centimeter,
24 this is column 27, slide 45, was selected to exclude blood
25 vessels. Blood vessels are non-neural tissue. So the two

1 centimeters discussed here in the actual language of the
2 specification is designed to exclude the non-neural tissue
3 because the sciatic nerve, coincidentally enough, has a
4 diameter of approximately two centimeters. So they were
5 actually choosing neural tissue with that two centimeters, not
6 non-neural tissue.

7 Dr. Bryan talked about this. Top of slide 46.
8 There's no specific diameter disclosed as to how to do this
9 throughout the patent, and specifically until the Filler
10 submission comes in and the opposition brief, NeuroGrafix's own
11 expert, Dr. Brant-Zawadzki said, quote, "With respect to how to
12 select a region of interest in the '360 patent, does the patent
13 describe a particular size or shape region to use?

14 Answer, No, it is exactly the opposite of what
15 NeuroGrafix now argues.

16 And they point to slide 47 -- this is actually the
17 image that was Exhibit 15 to the Filler report that we got.
18 The bottom right of this image, not what Mr. Fenster showed.
19 It has that red circle, which is allegedly that two centimeter
20 region of interest.

21 THE COURT: Yes.

22 MR. LoCASCIO: Dr. Filler himself sort of cuts pieces
23 out of it. He manually excludes some portion, he allows the
24 algorithm to draw, what I assume, is around the green section.
25 This is all in Dr. Filler's late submission. This is

1 quintessential expert testimony. This not a demonstrative.
2 This is their opinion to support -- the only thing they use to
3 support this two centimeter distinction. Putting aside that it
4 wasn't disclosed or adequately tested because it couldn't be
5 because of the way they approached it. Inconsistent with their
6 own expert, Dr. Brant-Zawadzki, but it also adds things that
7 aren't in the specification. It's, again, a subjective way
8 Dr. Filler chooses to select the ROI. That's not disclosed.
9 All of these are steps he had to come up with himself that are
10 not set forth in the patent.

11 And the last slide I have under the *S.O.I.TEC Silicon*
12 case, this concept of adding techniques that do not appear in
13 the patents cannot be used to satisfy the claim, Your Honor.
14 You can't read things in that aren't disclosed there to get
15 around the indefiniteness problem.

16 And so where we end on this issue is conspicuity
17 requires a region of interest. These claims didn't tell you
18 how to do it, and the patent itself says you can use any method
19 you want in a basket of them. And all the experts who
20 submitted expert disclosures in this case say you can use
21 different methods. Those methods lead to different
22 calculations, and mathematics itself, and indeed the experts
23 admit that doing it via different calculations gets you to a
24 different result. And in the face of that, the claims are
25 indefinite, Your Honor.

1 THE COURT: All right. Now, do you want to say
2 something else?

3 MR. FENSTER: Briefly, Your Honor.

4 First, Your Honor, Mr. LoCascio's --

5 THE COURT: Where are you now?

6 MR. FENSTER: Column 14 of the patent.

7 THE COURT: Yes.

8 MR. FENSTER: And Mr. LoCascio suggested that the
9 thresholding, the method of selecting the ROI is somehow
10 inconsistent with column 14. It is not. Column 14 says that
11 the region of interest may be a single pixel or many, and it
12 may be automatically or manually selected. That is entirely
13 consistent. When you do the thresholding process to select the
14 entire region, the entire nerve, it may be as small as a voxel
15 or it may be many; and you can do that thresholding process
16 manually or automatically, and you can do the two-centimeter
17 surround automatically or manually.

18 What the patent describes later as how it did the
19 calculation and how it selected the regions of interest is not
20 inconsistent with column 14. Second, what Mr. LoCascio showed
21 you with respect to Dr. Bryan's thresholding process of the
22 60% -- do you recall that image?

23 THE COURT: Yes, I do.

24 MR. FENSTER: And his analogy of the television
25 contrast --

1 THE COURT: I do.

2 MR. FENSTER: -- that is just not how thresholding
3 is done. You don't pick a random threshold and say let's see
4 what happens. You use a slider, and you adjust it until you
5 get the nerve, which you can identify through gross anatomy,
6 and when it goes above that and selects things that are clearly
7 not nerve, which you know through gross anatomy, that's how you
8 use the thresholding process to identify the region of
9 interest. That's what the patent describes.

10 Dr. Bryan is playing games with Your Honor. Your
11 Honor, in the real world, the conspicuity is much greater than
12 1.1. When the conspicuity of the nerves generated using this
13 method are much brighter -- and it's obvious just by the naked
14 eye to see that the nerves are brighter than the background --
15 then there's no question that that conspicuity element is met.
16 This is only -- their argument is only focused at the very
17 fringe argument -- which we don't even know if it exists in the
18 real world -- where the conspicuity is right around 1.1. Where
19 it's obvious -- as it will be in most cases -- that the
20 conspicuity is so much greater than 1.1, just by looking at it,
21 the method of calculation is irrelevant.

22 Your Honor, we don't know whether this is an academic
23 question right now or if this is a real question, whether this
24 patent does reasonably apprise one of skill in the art, what
25 the bounds of the claim are in a real-world context, and, Your

1 Honor, I submit to you that --

2 THE COURT: Say that once more.

3 MR. FENSTER: Yes.

4 Your Honor, this is an important point. If you --
5 the overwhelming majority of neurography studies, if done
6 right, have a conspicuity that is far above 1.1. It's not even
7 close. You know by looking at it you don't have to do a
8 calculation, you know by looking at it that it's much more than
9 10%. You only have to do the calculation if it's right at the
10 borderline, if it's right near 1.1.

11 Well, if it's right at 1.1, you haven't done a good
12 image. You haven't done it right. And, Your Honor, if you
13 allow us to proceed to discovery and we get to even a
14 representative sample of accused neurography studies, I submit
15 to you that what the evidence will show is that the
16 overwhelming majority you can -- there's no dispute, no way you
17 could possibly calculate it, wouldn't show that the 1.1
18 conspicuity element is met. We don't know until we get a
19 representative sample of accused studies whether this is
20 something that we're talking about on the fringe or whether
21 this is a real problem.

22 The patent law does not require absolute specificity.
23 What it requires is that the claims reasonably apprise one of
24 skill in the art, whether or not they're practicing the claim.
25 Your Honor, by analogy, if I were to draw a line on a piece of

1 paper, this piece of paper shows a definite line, and that's
2 what the claims have to do. But if I zoomed in on with a
3 microscope, this line would look like a mountain, and you'd say
4 I have no idea where this line actually is, what the boundaries
5 of this are. And, Your Honor, I submit to you that that is
6 what is happening here. We're focused in so close to the
7 borderline that these cases don't exist in the real world.

8 THE COURT: Let's go on.
9 Please.

10 MR. FENSTER: All right, Your Honor.

11 MR. LoCASCIO: Your Honor, if I may, before we move
12 on, I have one thing I want to show that we didn't have a
13 chance to talk about responding directly to what Mr. Fenster
14 just said.

15 At the end of the day, this 1.1 calculation is the
16 basis -- the point of novelty. It's how this claim was issued.

17 THE COURT: Well, I'm looking at what the examiner
18 said.

19 MR. LoCASCIO: Specifically --

20 THE COURT: -- so I can derive that on my own.

21 MR. LoCASCIO: You don't need me to explain that, to
22 be sure.

23 THE COURT: No.

24 MR. LoCASCIO: What I want to direct your attention
25 to is this is not a hypothetical exercise. The plaintiffs

1 themselves -- NeuroGrafix said on the right side on this screen
2 I've got, see, it says it's undisputed that the images in
3 Exhibit A to Dr. Filler's rebuttal report -- this is his expert
4 report from the first round of *Markman* -- were made using the
5 method disclosed in the claim by the '360 patent. So using the
6 method that's disclosed in this patent, Dr. Filler made images.
7 This isn't some hypothetical line exercise. This is --

8 THE COURT: That's all right. You don't have to say
9 that.

10 MR. LoCASCIO: The image that Dr. Filler submitted
11 had a conspicuity -- this is on slide 26 -- of 1.4. It's not
12 10, it's not 100, it's not so far away from 1.1. That same
13 image, if you chose your ROI, as one of skill in the art can,
14 if you look at the two images, Dr. Filler's in the green boxes,
15 you can see his selection of the square -- with the light blue
16 one -- if you can distinguish the difference -- it's different
17 for me to -- is the nerve. The green circle to the left of
18 that is the non-neural tissue, and he gets 1.4.

19 THE COURT: Stop. Now, let's go on.

20 MR. LoCASCIO: Okay. The last issue, Your Honor, I
21 believe is the summary judgment.

22 THE COURT: Yes.

23 MR. LoCASCIO: Okay. Let me walk through that.
24 Specifically, there are -- probably the easiest way to think of
25 it is three bases. The point of this was, Your Honor, to

1 address things from Your Honor's claim construction to narrow
2 issues in this case. And, first, this is the slide deck called
3 "anticipation." I don't -- we've got three different issues,
4 the first of which is pronounced -- as I've been told by
5 various obvious people who work in this industry -- *Hajnal* --
6 H-a-j-n-a-l. The *Hajnal* reference, it is agreed, teaches every
7 single thing in claim three. The only debate being how to deal
8 with the language of claim 3(d), 3(d)(iii) as it's been
9 described.

10 They -- NeuroGrafix has previously explained that
11 this means applying a pulse sequence. That's what step (d) is,
12 applying a pulse sequence to the patient through the MRI
13 machine and getting a result. What it does is talk about T2
14 weighting, namely, having an echo time and repetition time that
15 are different enough, Your Honor, that that generates a
16 particular response image. And the point of that, the way it's
17 written is to exploit this characteristic inherent in nerves.
18 And so the parties, Your Honor, took that definition, they
19 looked at what the claim said, and during the course of claim
20 construction, came to an agreement that what this meant is T2
21 weighting.

22 During the *Markman* hearing -- slide seven --
23 NeuroGrafix said claim three is long T2 waiting. During the
24 hearing, Mr. Fenster said the same thing: This claim relates
25 to long T2 waiting. The agreed-upon construction of this

1 phrase, is shown on the right, a combination of echo time and
2 repetition time designed to take advantage of the differences
3 in T2 values of the nerve compared to surrounding tissue. This
4 is commonly referred to as a T2 weighted sequence. *Hajnal*
5 discloses and uses a T2 sequence. It's not disputed that it
6 does.

7 And so the only basis for noninfringement is that the
8 claim requires something more than a T2 weighted sequence,
9 which is inconsistent with how the parties agreed this would be
10 construed. Claims four and five depend from claim three and
11 specifically apply echo time limitations or repetition time
12 limitations, TE and TR, to the broader language of T2 weighting
13 in claim three. They confirm that what claim three talks about
14 is using T2 weighting with something of this ratio.

15 NeuroGrafix admits that *Hajnal* discloses those
16 particular ranges, so claims four and five are disclosed by
17 *Hajnal*. The only difference for those, like three, is their
18 new proposed claim construction of that term.

19 This idea that -- obviously, if it meets the
20 dependent, it must meet the independent, I don't need to spend
21 the court's time.

22 The opposition brief from NeuroGrafix never
23 acknowledges or mentions the parties had agreed on what this
24 term meant. Their expert, when he submitted his report on this
25 issue, was never told or informed that this is what it meant.

1 They argue now that we should apply a new term or a new
2 limitation to claim three to avoid the *Hajnal* reference. That
3 new construction is incorrect. They argue that despite the
4 agreement, this element requires the user to check when running
5 a scan the actual T2 times of all of the non-neural tissue in
6 that particular image as the neural tissue.

7 This is not met -- and then they argue that this is
8 not met in *Hajnal*, figure five, and the basis for that
9 argument, Your Honor, is just a recycled version of the nerve
10 argument that we had as to does the nerve -- is it limited,
11 Your Honor, to areas outside of the -- I think the term was the
12 arachnoid space when we had this discussion originally or not.
13 And this argument was never raised, and this court's -- here
14 and the Northern District under the rules we all agreed to
15 follow say you cannot on the purpose of summary judgment ignore
16 the stipulated construction because then we would just have
17 parties at summary judgment shifting their positions around so
18 they can avoid summary judgment.

19 The whole point of what has been a, I think, helpful,
20 thorough -- we're going to get to -- there are claims that
21 obviously are not part of this summary judgment motion, there
22 are claims not part of the indefiniteness argument. To get to
23 the heart of what this case is really about, we have had a
24 process in place, and that process -- I think all sides would
25 agree -- has been valuable. What the -- but that process has

1 teeth, and when you agree to the construction, you can't later
2 on change it to avoid summary judgment.

3 Now, they argue it's not meant because the image has
4 shorter T2 times for the non-neural tissue than the nerve.
5 That ignores claim six because claim six depends from four,
6 which depends from three, and says the non-neural tissue
7 includes fat, and fat has a longer T2 constant than nerve.
8 Their position is, Well, it doesn't always, and depends on how
9 you take the image. But the fact of the matter is there are
10 references and places you can point to where fat -- this is the
11 whole point of fat suppression, because that's a different
12 technique to -- for lack of a better term -- to knock the fat
13 out of the image so you see the nerve more clearly. Fat having
14 a higher T2 time means claim six, if you -- you cannot
15 interpret claim three the way they suggest, but you can
16 interpret it the way they agreed to, because if you take it now
17 their new construction, then claim six doesn't make any sense,
18 and that is an improper way of construing a claim, to have the
19 dependent claim -- use a term -- inconsistently or be outside
20 of the dependent claim.

21 They also argue that, Well, we're not looking at, and
22 *Hajnal* doesn't really apply because it's somehow inside the
23 brain or the arachnoid space. The reason we filed this motion,
24 Your Honor, is because their only argument before this
25 opposition as to why *Hajnal* didn't anticipate is the *Hajnal*

1 reference, figure five, shows that trigeminal nerve, which is
2 cranial nerve five, inside the arachnoid space, and their
3 argument was, Well, that doesn't count because our claim is
4 somehow limited when we use the term "nerve."

5 The court rejected that argument. The court says,
6 You elected to include in your nerve description, cranial
7 nerves. They could have said "peripheral" or "autonomous
8 only," but they include cranial nerves three through 12. All
9 of these nerves have a portion inside the arachnoid space. The
10 court's construction, which they do not dispute, they have not
11 sought reconsideration on it, means that all pieces of that
12 nerve, including the pieces inside the arachnoid space, are
13 subject to the claim scope. By doing so, if a prior art
14 reference, like *Hajnal*, shows that piece of that nerve -- which
15 there's no dispute.

16 This is trigeminal nerve -- cranial nerve five, the
17 trigeminal nerve. It's one of the nerves that's covered by the
18 claim, and they admitted to the Patent Office -- also why we
19 thought this motion would clean up the claims that need not be
20 in this case anymore -- NeuroGrafix themselves admitted it
21 shows 1.1 conspicuity. Their argument now is where it shows
22 1.1 conspicuity, despite being a cranial nerve three through
23 12, renders it outside because of this arachnoid space. That
24 argument has been rejected. That is the basis for
25 Dr. Brant-Zawadzki's -- their expert's argument they don't

1 infringe -- pardon me -- that it's not anticipated. He says
2 it's construed to not count nerves that start in the arachnoid
3 space. He was asked, Well, are you aware that that issue was
4 construed by the court?

5 His interpretation is only look at the nerve outside
6 of the subarachnoid space. That is inconsistent with the
7 court's claim construction. He was never informed of that,
8 that's unfortunate, but that means his opinions on the issue
9 under *Liquid Dynamics*, *Chicago Mercantile*, basic common sense
10 would say, Well, if he is opining on something other than the
11 law the court has applied, namely, the claim construction, his
12 opinions are irrelevant and should not be considered. By
13 construing or analyzing the wrong construction, his opinions
14 need to be disregarded.

15 Even under NeuroGrafix's new proposed construction,
16 *Hajnal* shows tissues such as bone. Those also have shorter T2
17 constants than their nerve. So the idea that you have to dive
18 down into the prior art and into every image and analyze the T2
19 times of every single piece of flesh in there is not what the
20 claim requires, it's not what the parties agreed, but even if
21 you did that, the *Hajnal* reference would still anticipate.

22 So lastly, just to look at this claim language, claim
23 three, Your Honor, which is in column 37, parties agreed what
24 the language meant, and the new interpretation also just
25 doesn't make sense. Their new interpretation is --

1 highlighter -- it is to select in combination of echo and
2 repetition time. That exploits a characteristic, spin-spin
3 relaxation coefficient of peripheral nerves, cranial nerves
4 three through 12, and --

5 THE REPORTER: Counsel, please use the microphone.

6 MR. LoCASCIO: Sorry. Wherein said spin-spin
7 relaxation coefficient is substantially longer than that of the
8 surrounding tissue.

9 And what NeuroGrafix does in their brief is they use
10 ellipses and brackets to change "exploits a" characteristic
11 spin-spin relaxation coefficient, into the word "the." They
12 make a limitation that says "the spin-spin relaxation
13 coefficient." They then say this language, "Of peripheral
14 nerves or autonomic nerves" -- which is plural, it is the
15 characteristic that those nerves have -- they changed that to
16 be "the nerve," meaning the nerve being imaged. That is not
17 what the claim language says, and what they're trying to do is
18 take this generic T2 weighting, which the parties agreed it
19 meant originally, and turn it into something else, saying you
20 have to look at the relaxation coefficient of the nerve being
21 imaged.

22 That's not what this language actually says, and when
23 they talk about it in their brief, they change the words around
24 to be a new limitation called "the" characteristic relaxation
25 coefficient "of" the nerve. It's not what it says; that

1 limitation doesn't exist in this provision of claim three, and
2 the parties knew that when we agreed to what this language
3 meant, and now NeuroGrafix, to avoid summary judgment, should
4 not be able to change its tune.

5 With respect to the other claims, Your Honor, the
6 means-plus-function claims, there's no dispute. They don't
7 agree ultimately with Your Honor's claim construction. They're
8 not contesting it here; they've reserved their right, I
9 believe, for appeal. But for summary judgment on the
10 indefinite means-plus-function claims, NeuroGrafix agrees
11 summary judgment is proper. With respect to the
12 step-plus-function claims, the only argument to avoid summary
13 judgment on those is the reconsideration issue we've already
14 argued.

15 THE COURT: All right.

16 Please, Mr. Fenster.

17 What are we looking at?

18 MR. FENSTER: Your Honor, this is at column 23, the
19 bottom of 23, and the top of 24.

20 Your Honor, the patent recognized for the first time
21 that the T2 relaxation time of nerve is substantially longer
22 than that of muscle. This was new. Prior to that, based on
23 Dr. Moseley's work and others --

24 THE COURT: Where are we on --

25 MR. FENSTER: Describing it first. I haven't quoted

1 yet, Your Honor.

2 THE COURT: Right.

3 MR. FENSTER: So what this says is that the use of TE
4 processing had previously been considered unfeasible, meaning
5 it was previously thought that it was unfeasible to distinguish
6 nerve from muscle using TE time -- TE processing, as described
7 in Moseley.

8 Surprisingly -- it goes on at the top of column 24 --
9 "Surprisingly, however, measurements have been conducted
10 indicating that the T2 of muscle is approximately 27
11 milliseconds, while the T2 of peripheral nerve is approximately
12 55 milliseconds, providing a factor of two difference between
13 the two types of tissue. This was a key revelation in the '360
14 patent, that the T2 of nerve is substantially longer than the
15 T2 of muscle. Claim three is limited to those situations where
16 the nerve has a longer T2 than the tissue that surrounds it.

17 Your Honor, the limitation claim, 3(d), is shown on
18 the screen. This is in slide 11.

19 Claim three is explicitly limited to the situation at
20 the bottom wherein said spin-spin relaxation coefficient is
21 substantially longer than that of other surrounding tissue.
22 This requires that the T2 of nerve be substantially longer than
23 the surrounding tissue. Claim three is limited to that
24 particular situation to take advantage of this particular
25 revelation in the '360 patent. It is expressly so limited. It

1 is undisputed, Your Honor, that the *Hajnal* reference does not
2 meet that limitation.

3 In *Hajnal* the nerve is surrounded by gray matter and
4 cerebral spinal fluid. And on page 12, we have the T2 times
5 for gray matter, cerebral spinal fluid and white matter, which
6 is the nerve. Gray matter, which is the surrounding tissue, is
7 59.8; cerebral spinal fluid, which is the other surrounding
8 tissue, is 166; and the nerve, the cerebral white matter, is
9 56.8. It is not substantially longer than, and it is
10 undisputed that, the T2 of nerve is not substantially longer
11 than the surrounding tissue in *Hajnal*.

12 Slide 13.

13 This is showing the relevant times -- T2 times, as
14 applied to the *Hajnal* reference. The nerve is 56.8, and the
15 cerebral spinal fluid and gray matter, the background, are both
16 longer than the nerve T2 time. So the spin-spin coefficient of
17 nerve -- it is undisputed that the spin-spin coefficient refers
18 to the T2 time -- is longer than -- is not longer than that of
19 the surrounding tissue in the *Hajnal* reference. It does not
20 meet that "wherein" language.

21 So the next slide, slide 14, the claim requires that
22 the T2 of nerve be substantially longer than the T2 of
23 surrounding, but that limitation is not met in *Hajnal*. In
24 *Hajnal*, the T2 of the surrounding is actually longer than that
25 of nerve. That limitation is simply not met by the explicit,

1 clear, express language in the patent.

2 We're not interpreting anything. We're not asking
3 for any kind of construction. We're asking the court to apply
4 the plain language of the claim, which requires that the
5 spin-spin coefficient of nerve be substantially longer than
6 that of the surrounding tissue. That limitation is not met,
7 and undisputedly so, by *Hajnal*.

8 Now, the way Siemens argued this, frankly, Your
9 Honor, is litigation by ambush, and I don't say that lightly.
10 But, Your Honor, what they referred to is a "gotcha" argument
11 based on a stipulation, an agreed construction. So this is at
12 slide 15. The agreed construction is that the combination of
13 echo time and repetition time that exploits the characteristic
14 spin-spin, that is T2 weighting. I agree with that. That's
15 what we agreed to at the time. We did not agree to waive the
16 requirement that the T2 time of nerve be longer than that of
17 the surrounding tissue. We just agreed that this language
18 means that the process of selecting time -- echo time and
19 repetition time to exploit that characteristic is how you'd --
20 is T2 weighting, and that is how you determine whether or not
21 the T2 of nerve is longer than that of surrounding tissue.

22 Now, this stipulation was not even mentioned in
23 Siemens' opening brief. We never were put on notice that they
24 were somehow reading that our agreed construction somehow
25 waived this limitation. It was never flagged until

1 Mr. LoCascio pulled it out at an "ah-ha" moment, as a "gotcha"
2 moment, during the deposition of Dr. Brant-Zawadzki. That is
3 the first time I learned, and that was after our opposition,
4 and that is why we had to ask for the permission to file the
5 surreply.

6 That is the first time I learned that their basis for
7 saying that this 3(d)(e) element -- or 3(d)(iii) element was
8 raised -- was met because of our agreement. That is the first
9 time. And, Your Honor, this was not flagged in the opening
10 brief, and if they thought that we waived or changed the clear
11 language of the claim based on a stipulation, it should have
12 been spelled out so we could have addressed it in the
13 opposition because that is absolutely not what we agreed to.

14 The plain language of the claim requires that the
15 spin-spin characteristic of nerve be longer than that of
16 surrounding tissue. That element is not met by *Hajnal*. If the
17 court somehow thinks that we waived this by this agreement,
18 that is absolutely not what NeuroGrafix and the plaintiffs
19 intended by this agreement. We meant to resolve, in good
20 faith, the disputes, and this was language that we thought we
21 could agree to that the -- what this was referring to is T2
22 weighting to exploit the T2 characteristic. And that's how you
23 determine whether or not that "wherein" limitation is met.

24 Now, Mr. LoCascio raised the point that we somehow
25 didn't challenge the claim construction because we didn't seek

1 a motion for reconsideration. Just to protect the record,
2 obviously we maintain that where the court ruled against the
3 plaintiffs that the nerve wasn't limited to outside the
4 arachnoid space, we maintain our position that that was -- that
5 our position on that was correct. I respect the court's
6 decision on it, and we'll take that up on appeal, if necessary,
7 later. But we're -- I hope the court understands that we're
8 not waiving that because we didn't seek a motion for
9 reconsideration of that.

10 The argument -- Mr. LoCascio, who I generally believe
11 has a really excellent understanding of patent law -- made a
12 statement about dependent versus independent claims that I
13 think is just not right in this particular circumstance. This
14 is defendant's slide 13, and defendants are making the argument
15 that because *Hajnal* meets the limitations in dependent claims
16 four and five, it must necessarily meet the broader claim
17 (d)(iii), and that is -- that's just not -- that's not an
18 accurate statement of the law, and it's not logical. Just
19 because you meet a narrowing limitation of three and four does
20 not mean you infringe the independent claim or that the prior
21 art teaches the independent claim.

22 You can teach -- *Hajnal* may meet the limitations of
23 four and five, but if it doesn't meet the underlying
24 independent claim, it doesn't anticipate any of them. And what
25 we've shown clearly is that the express language of claim three

1 is not met; therefore, the fact that *Hajnal* does meet the
2 specific limitations in four and five is irrelevant. There is
3 no anticipation of claims three, four and five unless they show
4 anticipation of three first, and this limitation of three is
5 not met, and I don't think that this argument that because four
6 and five are met, three must, therefore, be met follows. I
7 think that is contrary to law.

8 THE COURT: Is that it?

9 MR. FENSTER: Yes, Your Honor.

10 MR. LoCASCIO: If I might briefly, Your Honor, I
11 actually think Mr. Fenster and I agree. I think this is a core
12 enough premise that we both agree with the concept that if you
13 infringe an independent -- pardon me -- if you infringe a
14 dependent claim, you, as a matter of fact, infringe the
15 original -- if you infringe a dependent claim, you must
16 infringe the independent claim it depends from. If we disagree
17 about that, we can disagree, and I'm fairly confident that that
18 is the law.

19 THE COURT: Is that what you said?

20 MR. FENSTER: Your Honor, I said that in order to
21 infringe for infringement, of course, you must -- in order to
22 infringe claim four, you must infringe claim three. But
23 Mr. LoCascio's point, I think, is that if you meet the
24 limitation of four, then you necessarily meet the limitation of
25 three, as well. That is the part that I disagree with.

1 MR. LoCASCIO: I don't see the difference in those
2 two things. If you meet the limitations of four, you infringe
3 claim four.

4 THE COURT: I don't know exactly what we just did.

5 MR. LoCASCIO: I think where the difference is, if I
6 might --

7 THE COURT: And if a court just goes along with
8 something the court doesn't understand in a patent case, the
9 court is making a bad mistake, and I didn't understand that
10 point.

11 MR. LoCASCIO: If I might state my position that
12 Mr. Fenster started with, I think this will clear this all up
13 before I get to the points I want to make, and the first is
14 claim four and five have additional limitations that are --

15 THE COURT: I understood that.

16 MR. LoCASCIO: -- that are acknowledged to be in
17 *Hajnal*. So the entire analysis of all three claims -- I think
18 Mr. Fenster and I can agree -- it comes down to this limitation
19 Mr. Fenster believes is in claim three that we believe is not.
20 And my view is if claim three has a limitation not found in
21 *Hajnal*, then four and five would not be invalid, just like
22 claim three would not be invalid --

23 THE COURT: That's what he said.

24 MR. FENSTER: We agree on that.

25 MR. LoCASCIO: I thought I brokered a solution. I

1 don't know that I have.

2 MR. FENSTER: I believe, Your Honor, Mr. LoCascio's
3 point -- and Mr. LoCascio can correct me if I'm wrong -- this
4 is claim four, Your Honor. Claim four narrows claim three to
5 say where, in the step of selecting the echo time repetition --

6 THE COURT: I know that.

7 MR. FENSTER: Okay. Where the echo time is greater
8 than milliseconds.

9 THE COURT: Yes.

10 THE WITNESS: Okay. And what I heard Mr. LoCascio to
11 say is that if *Hajnal* meets this limitation of selecting 60
12 seconds, or greater, then it must necessarily meet the
13 limitation of (d) in step three.

14 Is that what you said?

15 MR. LoCASCIO: Your Honor, we believe claim four and
16 five, as written, talking about the setting of those TE and TR
17 times, confirms what was the agreed upon in our reading of the
18 language of (d)(iii), but at base, I don't think Mr. Fenster
19 and I have a difference of opinion on this. If there is a
20 limitation in claim three that is not satisfied by *Hajnal*, just
21 satisfying a particular feature of the additional dependent
22 claim four would not render three, nor four, invalid.

23 MR. FENSTER: We agree on that.

24 THE COURT: That's right.

25 MR. LoCASCIO: I think we all went around just on

1 words that -- semantic disagreement --

2 THE COURT: I think now words are killing you.

3 MR. LoCASCIO: To respond --

4 THE COURT: You know, if one listens carefully, one
5 must come to the conclusion that you agree about this.

6 MR. LoCASCIO: We do, on this issue. My view and
7 Siemens' view is three, four and five rise and fall together --

8 THE COURT: They do --

9 MR. LoCASCIO: -- I think Mr. Fenster's view is the
10 same.

11 THE COURT: That's right.

12 MR. LoCASCIO: And so I want to address a couple --

13 THE COURT: They do rise or fall together.

14 MR. LoCASCIO: It could be possible that they
15 wouldn't, if NeuroGrafix had identified something unique about
16 the additional limitations in four and five, and our point was
17 that they do not; ergo, they all rise and fall together, Your
18 Honor.

19 THE COURT: That's right.

20 THE WITNESS: Now, I want to respond to two points
21 Mr. Fenster made. First, the suggestion, Your Honor, that this
22 was -- in his words -- by ambush, I want to direct the court's
23 attention, and Mr. Fenster's apparently, to two different
24 passages in the opening brief on this issue. First, the chart
25 where we laid out why we think the *Hajnal* reference meets the

1 limitations, page 11 of Siemens' opening brief. On the left,
2 we have claim language. On the right, we have the *Hajnal*
3 disclosure, and we say, *Hajnal* discloses the T2 weighted
4 sequence see D.I. 99-1 at 15, stipulating the combination of
5 echo time, TE, and repetition time, TR, referred to in step (d)
6 as commonly called T2 weighting. That is the parties'
7 stipulated construction.

8 In addition, page three of Siemens brief, the
9 parties -- footnote four -- in the exhibit to the joint claim
10 construction statement stipulate that the language in claim
11 three requiring a combination of echo time and repetition time
12 that exploits a characteristic spin-spin relaxation coefficient
13 of peripheral nerves, cranial nerves three through 12, and
14 autonomic nerves wherein said spin-spin relaxation coefficient
15 is substantially longer than that of surrounding tissue means
16 using what is commonly referred to in a T2 weighted sequence.
17 Again, cite D.I. 99-1 at page 15.

18 So the suggestion that nowhere in the opening brief
19 was this raised that this was some "gotcha" is false, Your
20 Honor. The parties are operating -- and have always been
21 operating -- under, first, the agreed-upon construction, and on
22 issues we did not agree on, Your Honor's claim construction
23 order. And on that basis, we sought summary judgment, and we
24 continue to believe we are entitled to summary judgment because
25 there is no dispute under the parties' agreed-on construction

1 that *Hajnal* meets all of the limitations.

2 The only other point I want to make is if we actually
3 look at the claim language -- because Mr. Fenster's argument is
4 put aside the parties' agreements because we didn't mean it,
5 and the practice -- the procedure, and what we've gone through
6 for over a year, suggests we cannot simply, on summary
7 judgment, allow either side to change their tune and change
8 their positions on claim construction. But this premise is
9 also wrong. If you look at claim -- the agreed-upon term 10 --
10 this is the parties' agreed language. This is slide 15 in the
11 NeuroGrafix deck -- it not only refers to claim three, it
12 refers to claim 25, and in claim 25, the language "is" is
13 replaced by "of these nerves being."

14 And what that refers to, Your Honor, is this
15 collection of things, peripheral nerves, cranial nerves three
16 through 12, and autonomic nerves. "Of these nerves being" is
17 not "the nerve being imaged."

18 It is generic description of T2 weighting and the
19 difference between TE and TR in these type of nerves. And the
20 language in the claim itself, in claim three, that Mr. Fenster
21 put up, is slide 11 from the NeuroGrafix's deck. What
22 NeuroGrafix points to is the last portion of the claim
23 language, limitation (d) in claim three. Their position is the
24 words "wherein said spin-spin relaxation coefficient is
25 substantially longer" is a stand-alone limitation. It was

1 previously agreed that this whole thing means T2 weighting, but
2 if you actually look, claim construction 101, it is "Said
3 spin-spin relaxation coefficient," meaning there is antecedent
4 basis for that in this claim. "Said" as opposed to "a." And
5 if you look, "said spin-spin relaxation coefficient" -- if you
6 see my blue arrow -- refers to "a characteristic spin-spin
7 relaxation coefficient" of all three of the possible types of
8 nerves at issue.

9 And so as the parties agreed is what the claim
10 actually means. It says, "Selecting the combination of echo
11 and repetition time." Claims four and five then tell us what
12 those times should be. That exploits something, and what is it
13 exploiting? It's exploiting, i.e., the concept of T2
14 weighting, a characteristic spin-spin relaxation coefficient.
15 That is inherent in peripheral nerves, cranial nerves three
16 through 12, and autonomic nerves, and that inherent spin-spin
17 relaxation coefficient is substantially longer than that of
18 surrounding tissue.

19 It is not -- as NeuroGrafix now contends -- an
20 additional limitation that requires one to go in and determine
21 the coefficient of every single thing in the surrounding tissue
22 and the nerve to divine whether or not you have fallen within
23 the scope of this claim. If that was their position, it would
24 have been a significant difference of opinion between the two
25 parties, it would have been significant issue to be addressed

1 at claim construction, it would not have been agreed that this
2 is simply T2 weighting.

3 And to Mr. Fenster's point that Dr. Filler and others
4 invented or came up with the idea of T2 weighting, we are
5 pulling up the cite that Dr. Filler, in his own deposition,
6 makes abundantly clear. They did not invent T2 weighting.
7 They were not the first to image a nerve with T2 weighting.
8 This is not something, Your Honor -- T2 weighting is not the
9 invention, it's in the art, it's described that way, and this
10 is just applying that known technique, and it is not an
11 additional limitation as they contend.

12 Thank you, Your Honor.

13 MR. FENSTER: Your Honor, Dr. Filler did not invent
14 T2 weighting; he doesn't claim to have --

15 THE COURT: Well, I know he didn't.

16 MR. FENSTER: What he invented was a way to image
17 nerves in the situation where the T2 of nerve is longer than
18 that of surrounding tissue, as opposed to where it's shorter
19 than, which is usually the case in the brain and in the
20 arachnoid space. I'm not re-arguing the claim construction
21 with respect to the definition of nerves, but the claim itself
22 explicitly says -- limits it to that the spin-spin coefficient
23 is -- of nerve is longer than that of surrounding tissue.

24 Now, unless you agree that we intended to and did
25 waive that limitation, and even that we could, this limitation

1 that wherein said spin-spin relaxation coefficient,
2 substantially longer than that of other surrounding tissue,
3 that is the only way that you find summary judgment. And, Your
4 Honor, that is just not what we intended, and it's not what we
5 agreed to.

6 This claim 3(d) does refer to T2 weighting, and you
7 do use the prior art technique of T2 weighting to determine
8 whether or not this limitation is met, whether or not the T2 of
9 nerve is longer than the T2 of the surrounding tissue. You can
10 not read that limitation out of the claim, and that is what you
11 have to do in order to find that *Hajnal* meets that limitation.

12 THE COURT: All right. Is there anything further?

13 MR. LoCASCIO: I think, in the course of this
14 discussion, we've -- it has been discussed in some measure. If
15 Your Honor wishes to hear separate argument --

16 THE COURT: No, no.

17 MR. LoCASCIO: -- what I'll call the procedural
18 aspect motion -- Siemens' position is we stand on our briefs on
19 those issues.

20 THE COURT: I don't want to hear any more about the
21 expert.

22 MR. LoCASCIO: Then I don't believe we have any other
23 motions before Your Honor.

24 MR. FENSTER: Nothing further, Your Honor.

25 THE COURT: It will be submitted. I'll let you know

1 if there is to be anything further. Thank you.

2 MR. LoCASCIO: Thank you, Your Honor.

3 MR. FENSTER: Thank you, Your Honor.

4 (Proceedings concluded at 1:50 p.m.)

5 - - - - -

6 C E R T I F I C A T E

7
8 I hereby certify that the foregoing is a true and
9 correct transcript from the stenographic record of
10 the proceedings in the foregoing matter.
11

12 October 15, 2011

13 /S/ _____

14 Deborah K. Gackle
15 Official Court Reporter
16 CSR No. 7106

Date

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